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Supreme Court, U.S.
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No. 90-

In The

Supreme Court of the United States

October Term, 1990

SPERRY CORPORATION AND
SPERRY WORLD TRADE, INC.,

Petitioners,

v.

THE UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

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May 1, 1991

QUESTION PRESENTED

The Court has ruled in this case before. In United States v. Sperry Corp., 110 S. Ct. 387 (1989), the Court held that the Iran Claims Settlement Act did not violate Petitioners' due process or equal protection rights. The Court declined to rule upon Petitioners' claim that Congress passed the Act in violation of the Origination Clause, U.S. Const. art. I § 7, and remanded the case to the Federal Circuit to "benefit from the views" of that court. 110 S. Ct. at 397. On remand, the Court of Appeals held that the Senate-originated bill did not "raise revenue" within the meaning of the Origination Clause. 925 F.2d 399 (Fed. Cir. 1991).

The Iran-United States Claims Tribunal ("Tribunal") was established by

the Algiers Accords in 1981. Four years later, Congress enacted the Iran Claims Settlement Act to retroactively authorize deductions from every award issued by the Tribunal in favor of United States claimants. According to the Act's co-sponsor, the bill was designed to prevent a refund of over $6 million deducted from arbitral awards under an earlier administrative scheme that the United States Claims Court declared void, and to "guarantee that an additional $12 to $20 million in revenues . . . would go into the Treasury to offset the deficit."

The question presented is: whether the Iran Claims Settlement Act, which concededly originated in the United States Senate, violates the Origination Clause because the Act

authorizes deductions from Tribunal awards independently of and four years after the Tribunal's creation, and directs that all sums deducted go into the general Treasury fund for unrestricted use.

PARTIES TO THE PROCEEDINGS BELOW

Sperry Corporation and Sperry World Trade, Inc. (a wholly owned subsidiary of Sperry Corporation)[1/] were plaintiffs in the Claims Court and

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1/ The real party in interest is UNISYS Corporation, the successor to Sperry Corporation following the merger of Sperry Corporation and Burroughs Corporation, and renamed as of November 16, 1987. Shares of Sperry Corporation and Burroughs Corporation may still be outstanding. Other affiliates and subsidiaries, some of which may not be publicly traded, include: Nihon Unisys, Ltd., Oki Unisys Kaisha, Ltd., Sperry Arabia Ltd., Tecnologia S.p.A., UNISOFT - Sistemas Informaticos S.A., Tata Unisys Ltd., Compubur, S.A. de C.V., Synapsis S.A., IDAT, Industria de Alta Tecnologica, S.A., Unisys-Cyberware Inc., SDC (1981) Ltd. (inactive, in process of dissolution), Unipos AB.

plaintiffs-appellants in the Federal Circuit.

Respondent United States of America was defendant in the Claims Court and appellee in the Federal Circuit.

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OTHER OPINIONS

The opinion for which Petitioners seek review is reproduced in the annexed Petitioners' Appendix ("App.") at pp. 1a-31a and is reported at 925 F.2d 399 (Fed. Cir. 1991). Other opinions in this case are this Court's decision remanding the case to the Federal Circuit, reproduced at App. 32a - 45a and reported at 110 S. Ct. 387 (1989), and the following opinions: Sperry Corp. v. United States, 853 F.2d 904 (Fed. Cir. 1988)(App. pp. 46a-56a); Sperry Corp. v. United States, 12 Cl. Ct. 736 (1987)(App. 57a-70a); Sperry Corp. v. United States, NO. 660-82C (May 1, 1985) (Bench Ruling)(App. 71a-96a).

JURISDICTION

The opinion and judgment of the court of appeals was entered on January 31, 1991. No petition for rehearing was filed. Jurisdiction to review the judgment of the Court of Appeals is conferred on this Court by 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

1. The Origination Clause of the Constitution, U.S. Const. art. I, provides:

> All Bills for raising Revenue shall originate in the House of Representatives: but the Senate may propose or concur with Amendments as on other Bills.

2. Section 502 of the Foreign Relations Authorization Act, Fiscal

Years 1986 and 1987, Pub. L. No. 99-93, 99 Stat. 438, codified at 50 U.S.C. 1701 note (1988) provides:

> (a) DEDUCTION FOR EXPENSES OF THE UNITED STATES. - Except as provided in section 503, the Federal Reserve Bank of New York shall deduct from the aggregate amount awarded under each enumerated claim before the Iran-United States Claim Tribunal in favor of a United States claimant, an amount equal to 1 1/2 percent of the first $5,000,000 and 1 percent of any amount of $5,000,000, as reimbursement to the United States Government for expenses incurred in connection with the arbitration of claims of United States claimants against Iran before that Tribunal and the maintenance of the Security Account established pursuant to the Declarations of the Democratic and Popular Republic of Algeria of January 19, 1981. The Federal Reserve Bank of New York shall make the deduction required by the preceding sentence whenever the Bank receives an amount from the Security Account in satisfaction of an award rendered by the Iran-United States Claims Tribunal on the enumerated claim involved.

(b) DEDUCTION TREATED AS MISCELLANEOUS RECEIPT. - Amounts deducted by the Federal Reserve Bank of New York pursuant to subsection (a) shall be deposited into the Treasury of the United States to the credit of miscellaneous receipts.

(c) PAYMENT TO UNITED STATES CLAIMANTS. - Nothing in this section shall be construed to affect the payment to United States claimants of amounts received by the Federal Reserve Bank of New York in respect of awards by the Iran-United States Claims Tribunal, after deduction of the amounts calculated in accordance with subsection (a).

(d) EFFECTIVE DATE. - This section shall be effective as of June 7, 1982.

STATEMENT OF THE CASE

This Petition stems from a decision of the United States Court of Appeals for the Federal Circuit following remand from this Court. In the opinion remanding the matter, this Court sought the views of the court of appeals on the claim of Petitioners Sperry Corporation and Sperry World Trade, Inc. (collectively "Sperry") that the Iran Claims Settlement Act (the "Act")[2/] violates the Origination Clause of the United States Constitution.[3/] Although the

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2/ The Act appears as Section 502 of the Foreign Relations Authorization Act, fiscal years 1986 and 1987, 99 Stat. 438, 50 U.S.C. § 1701 note (1988).

3/ The Court of Appeals' prior opinion had not resolved Petitioners' challenge because the court struck down the Act as unconstitutional under the Fifth Amendment, and found it unnecessary to address Petitioners' other constitutional challenges. App. 56a. This Court

extensive factual record in this case is summarized in the earlier opinion of this Court, App. 32a-36a, a brief review here provides useful context.

In order to terminate a disabling diplomatic crisis and effect the release of the fifty-two Americans held hostage in Iran for over a year, the United States on January 19, 1979 entered the Algiers Accords. See App. 33a. In this series of agreements, the United States agreed to terminate all proceedings against Iran in the United States courts, nullify all attachments of Iranian property obtained in those

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deemed it necessary to remand the matter because when it rendered its opinion in this case it had not yet decided United States v. Munoz-Flores, 110 S. Ct. 1964 (1990), which involved the justiciability of claims involving the Origination Clause. See United States v. Sperry Corp., 110 S. Ct. at 397; App. 44a-45a.

proceedings, prohibit further litigation based on such claims, and refer all outstanding claims to the Iran-United States Claims Tribunal ("Tribunal") for arbitration. 110 S. Ct. at 391-92; App. 33a-35a.

Eighteen months later, the United States Department of Treasury ("Treasury") issued a Directive License authorizing a two percent deduction from funds representing every Tribunal award, as purported reimbursement for the costs of operating the Tribunal, even though a system for adjudicating and paying claims was already in place. 110 S. Ct. at 392; App. 35a. When the President signed the Algiers Accords in 1981, Congress neither expressed its disapproval nor "enacted legislation or even passed a resolution indicating its displeasure

with the [Accords]," Dames & Moore v. Regan, 453 U.S. 654, 687 (1981), including the government's agreement to be responsible for half of the costs of operating the Tribunal.

On December 17, 1982, Sperry commenced this action in the United States Claims Court challenging the two percent fee deducted under authority of the Directive License.[4/] On May 1, 1985, immediately after argument on the parties' cross-motions for summary judgment, former Chief Judge Kozinski found that the Directive License failed to comply with the Independent Office Appropriations Act, and directed the

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4/ The United States Claims Court had jurisdiction over Petitioners' claims pursuant to 28 U.S.C. § 1491(a)(1) (1988), in that Petitioners' claims against the United States are founded upon the United States Constitution and an Act of Congress. See S. Ct. R. 14(i).

government to return the fees it had collected from Sperry. Sperry Corp. v. United States, No. 660-82C (May 7, 1985)(Bench Ruling); App. 93a.

Less than three weeks after Sperry was victorious in its class action suit for refunds of the deductions, the government sought legislation to retroactively authorize those deductions from all arbitral awards issued by the Tribunal for the prior three years, back to June 7, 1982. 131 Cong. Rec. S6489 (daily ed. May 17, 1985); see 110 S. Ct. at 392; App. 35a-36a. Facing a potentially vast refund of revenues to claimants such as Sperry, Congress hastily approved the measure. Senator Evans, as co-sponsor of the Act, explained the motive behind the bill:

> The validity of [the Directive License] has been challenged in the U.S. Claims Court. The chief judge of that court recently indicated his intent to enter a decision adverse to the United States. As a result, without our legislation, the entire amount collected to date would be subject to refund by decisions of that court.
>
> Our legislation would ensure that the bulk of the amounts recovered to date, over $6 million, would remain in the Treasury. Further, it would guarantee that an additional $12 to $20 million in revenues, which the Department of State estimates would be collected under our bill, would go into the Treasury to offset the deficit.

131 Cong. Rec. S64903 (emphasis added); see also 925 F.2d 399; App. 23a. The bill (S. 1116) originated in the Senate and became an amendment to the Foreign Relations Authorization Act, Fiscal Years 1986 and 1987, 99 Stat. 438, 50 U.S.C. § 1701 note, which contained

no other provision relating either to adjudications at the Tribunal or to raising revenue for some other purpose. See 131 Cong. Rec. H6812, H6835 (daily ed. July 30, 1985) ("The House Bill contains no comparable provision."). Both Houses passed the bill and the President signed the bill into law on August 16, 1985.

After Congress passed the Act, the government sought dismissal of Sperry's claims on a suggestion of mootness. Sperry challenged the government's assertion on the grounds that the retroactive legislation violated due process and equal protection rights, as well as the Origination Clause. The Claims Court (per newly appointed Chief Judge Smith) found the retroactive legislation constitutional and dismissed

Sperry's claims as moot. Sperry Corp. v. United States, 12 Cl. Ct. 736 (1987); App. 70a. Sperry appealed, and the Federal Circuit reversed the Claims Court and found for Sperry on the Fifth Amendment takings claim. Sperry Corp. v. United States, 853 F.2d 904 (Fed. Cir. 1988); App. 56a. It did not pass on Sperry's other constitutional challenges, including the claim under the Origination Clause. Id. at 909; App. 56a.

On further appeal, this Court reversed the judgment of the Federal Circuit. The Court ruled against each of Sperry's constitutional arguments, except the Origination Clause challenge. United States v. Sperry, 110 S. Ct. 387 (1989); App. 32a. The Court withheld ruling on the Origination Clause issue

due to its then-forthcoming review in an unrelated case which would address the threshold issue of justiciability of such claims, and remanded the case for further proceedings because "assuming that Origination Clause claims are justiciable, we would benefit from the views of the Court of Appeals". 110 S. Ct. at 397; App. 45a. Thereafter, the Supreme Court ruled that challenges based on the Origination Clause are subject to judicial review and are not non-justiciable political questions. United States v. Munoz-Flores, 110 S. Ct. 1964, 1968-70 (1990).

On remand, the Federal Circuit ruled in a 2-1 decision against Petitioners, holding that the enactment of the Iran Claims Settlement Act did not violate the Origination Clause because

it does not "raise revenue" in the constitutional sense. 925 F.2d at 401-402; App. 8a. Judge Mayer filed a dissent in which he explained that if the Origination Clause is to have any teeth at all, then it must prohibit legislation like the Iran Claim Settlement Act, in which the Senate originates a fee or tax years after the establishment of the program it purports to fund, "deposits the proceeds in a general Treasury fund, and admits through the statements of a legislative sponsor that the proceeds are really intended either to reduce the federal budget deficit or to support the operation of the government generally." 925 F.2d at 406; 29a-30a.

REASONS FOR GRANTING THE WRIT

The Court should hear this case because the opinion below threatens the continued vitality of the Origination Clause. See, e.g., Verlinden v. Central Bank of Nigeria, 461 U.S. 480, 482 (1983)(certiorari granted to consider whether Foreign Sovereign Immunities Act violates Article III of Constitution). The Federal Circuit's opinion allows the Senate to pass a bill to raise revenue for the general use of the Government and circumvent the Origination Clause by simply labelling its measure a "user fee" or "reimbursement", even if the bill does not establish the program purportedly to be funded, or provide any mechanism to assure that proceeds are collected or disbursed for the benefit of the program. The Iran

Claims Settlement Act is unlike any legislation previously found by this Court to be enacted within the constraints of the Origination Clause. See, e.g., Library of Congress v. Shaw, 478 U.S. 310, 314 (1986)(certiorari granted to consider whether court of appeals decision "conflicts with this Court's repeated holdings" regarding award of interest against Government). Even though our government admirably may be seeking new sources of revenue, it must follow the procedures established in the Constitution for the raising of such revenue.

A. The Iran Claims Settlement Act Raises Revenue Within The Meaning Of The Origination Clause

The Origination Clause of the Constitution provides simply that "[a]ll Bills for raising Revenue shall originate in the House of Representatives." U.S. Const. art. I, § 7, cl. 1. This Court's opinions applying this section have established certain general principles to aid in the determination of which bills "raise-revenue" within the clause's express requirement of House origination.[5/]

5/ In this case there is no issue as to where the bill originated. The Federal Circuit did not question, and the Government has not challenged, the fact that the bill that became the Iran Claims Settlement Act originated in the Senate and did not amend any revenue-raising House bill. The bill is designated "S. 1116", and the legislative history confirms the Senate's origination of the Act: "The House bill contains no comparable provision . . . . The conference substitute is

The court below accepted the axiom that "revenue bills are those that levy taxes in the strict sense of the word, and are not bills which may incidentally create revenue." 925 F.2d at 401 (quoting Twin City Bank v. Nebeker, 167 U.S. 196, 202 (1897)). Thus, in reviewing legislation challenged under the Origination Clause, a Court must determine whether the raising of revenue is incidental to the challenged legislation's primary purpose. See, e.g., United States v. Munoz-Flores, 110 S. Ct. 1964, 1973 (1990)("Any revenue for the general Treasury that [the statute] creates is thus incidenta[l]' to that

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substantially the same as the Senate provision." 131 Cong. Rec. H6812, H6835 (daily ed. July 30, 1985). Thus, the only issue in this case is whether the Act "raises revenue" under the Origination Clause.

provision's primary purpose"); see also United States v. Newman, 889 F.2d 88, 98 (6th Cir. 1989) ("Only if the primary purpose of a bill is to raise revenue must it originate in the House of Representatives"); South Carolina ex rel. Tindal v. Block, 717 F.2d 874, 887 (4th Cir. 1983) ("If regulation is the primary purpose of a statute, revenue raised under the statute will be considered a fee rather than a tax."). The court below, however, took liberty to modify this inquiry and ruled that "Sperry has simply not demonstrated that the deduction provision is of such 'overwhelming importance' as to convert what was a bill establishing a user fee into a bill for raising revenue." 925 F.2d at 402. The Federal Circuit provided no authority for its introduction of the "overwhelming importance" inquiry

into Origination Clause anaylsis, and no other reasoning for its dilution of the Origination Clause's text and this Court's practice of determining whether a revenue raising measure is incidental, rather than "overwhelmingly important", to challenged legislation. Additionally, a "user fee" separately established is no less "revenue-raising" than a tax or other fee, which must still comply with the Origination Clause's requirements. See below n.12.

The court below further ignored two other crucial aspects of the inquiry into a bill's purpose. First, it did not address the precedent of this Court (on which Petitioners relied) which holds that if the purpose of an act is to raise revenue to be applied to meet the expenses of the government

generally or otherwise create public funds for the service of the government, the legislation "raises revenue" within the meaning of the Origination Clause. Millard v. Roberts, 202 U.S. 429, 436-37 (1906); United States v. Norton, 91 U.S. 566, 569 (1876). Second, the court below failed to consider that when a bill levies a tax, this Court will only deem it "non-revenue raising" under the Origination Clause if the taxing provision furthers a non-revenue raising objective of the bill. Twin City Nat'l Bank, 167 U.S. at 202. Failing to consider these edicts led the court below, and will lead any subsequent court which follows the court of appeals' error, to uphold improperly enacted legislation.

Examination of the Act demonstrates that, if nothing else, the bill

was designed to raise revenue to support the government as much as any "tax in the strictest sense," and that the revenue raising aspect of the Act furthers no other purpose in the Act. In the preamble, the bill asserts two primary purposes: (1) "[t]o facilitate the adjudication of certain claims of United States nationals against Iran", and (2) "to authorize the recovery of costs incurred by the United States in connection with the arbitration of claims of United States nationals against Iran". S. 1116, 98th Cong., 1st Sess. (preamble), 131 Cong. Rec. S6490 - 91 (daily ed. May 17, 1985).[6/]

6/ Apart from the preamble, the Claims Court based its Origination Clause ruling erroneously on the belief that the Act "was designed to provide a forum for United States nationals to litigate their claims against the government of Iran." 12 Cl. Ct. at 742; App. 68a. This con-

The first stated purpose, however, is limited to providing a mechanism for the government to effect an "en bloc" (joint) settlement on behalf of claimants whose claims were less than $250,000.[7/] 131 Cong. Rec. S6489 (daily ed. May 17, 1985); Senate Hearings at 1 ("Both bills provide statutory authority for the Foreign Claims Settlement Commission to make awards to small claimants . . . in the event the Department of State reaches an en bloc settlement

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clusion was plain error. The Algiers Accords and nothing else established the Tribunal and its mechanisms for litigating and settling claims.

7/ The Algiers Accords provide that claims of less than $250,000 were to be presented to the Tribunal on behalf of U.S. claimants by our government. See Iran Claims Legislation: Hearing on S. 771 and S. 116 Before the Committee on Foreign Relations, United States Senate, 99th Cong., 1st Sess. 1, 14, 24-25, (1985)(hereafter "Senate Hearings").

of small claims with Iran") (statement of Senator Evans). This stated purpose is entirely inapplicable to Sperry and other claimants with claims of $250,000 or more: under the Algiers Accords, these larger claimants presented their claims directly to the Tribunal, on their own behalf. Id. Further, this provision is plainly peripheral to the Act's revenue-raising function -- the funds raised do not further en bloc settlement of small claims in any way.

Apart from the preamble, in determining that the Iran Claims Settlement Act did not raise revenue within the meaning of the Origination Clause, the majority below relied on the Act's four sections that do not concern the deductions at issue in this case. 925 F.2d 401-402; App. 8a-9a. Yet, as the

dissent explains in detail, these sections involve "a dubious prospect . . . not available to Sperry," 925 F.2d at 404 n.1; App. 20a, are "merely technical," or are "decidedly secondary" to the revenue-raising function. 925 F.2d at 405; App. 26a-27a. Again, the revenue raised does not further any of these incidental purposes. See 925 F.2d at 405; App. 28a (Mayer, J., dissenting). Moreover, "[t]he Act's other provisions neither negate nor override its essential revenue-raising purpose . . . It is apparent from the legislative history that Congress devoted far more attention to section 502 [arbitral deductions] than to the other four sections of the Act combined." 925 F.2d at 405; App. 27a-28a (Mayer, J., dissenting).

The second stated purpose of the Act -- "to authorize the recovery of costs" -- identifies the Act as primarily a bill for raising revenue. Senator Evans' introductory statement on the floor of the Senate leaves no room for doubt:

> Our legislation would ensure that the bulk of the amounts recovered to date, over $6 million, would remain in the Treasury. Further, it would guarantee that an additional $12 to $20 million in revenues, which the Department of State estimates would be collected under our bill, would go into the Treasury to offset the deficit.

131 Cong. Rec. S6490 (daily ed. May 17, 1985) (emphasis added). Similarly, in the brief hearing on the bill, Senator Evans candidly admitted: "[s]eldom, if ever, does the Foreign Relations Committee have an opportunity to restore funds

to the public first [sic, fisc]. We pledged that this opportunity will not be lost." Senate Hearing at 2; see App. 23a. Thus, the primary purpose of the Act was to exact percentage deductions from Tribunal awards. 8/ As the dissent below recognized,

> no amount of post hoc rationalization should obscure what the facts of this case clearly show -- a naked attempt to raise revenue for general government purposes, belatedly placed in the context of supporting a particular program and shrewdly couched in the language of reimbursement for benefits conferred.

925 F.2d at 405; App. 25a-26a. Such legislation, when originated by the Senate, violates the Constitution.

8/ These deductions, according to the terms of the Act, "shall be deposited into the Treasury of the United States to the credit of miscellaneous receipts," 50 U.S.C. § 1701 note, at § 502(b) (emphasis added), thereby efficiently serving the purpose of deficit reduction.

B. The Court Below Upheld The Iran Claims Settlement Act Although That Act Shares None Of The Characteristics of Legislation This Court Has Upheld Under the Origination Clause

To survive scrutiny under the Origination Clause, a bill should share at least some of the elements of prior legislation that this Court has upheld. For example, in Munoz-Flores, this Court explained that it has interpreted the provision "to mean that a statute that creates a particular governmental program and that raises revenue to support that program, as opposed to a statute that raises revenue to support the government generally, is not a 'Bil[l] for raising Revenue' within the meaning of the Origination Clause." United States v. Munoz-Flores, 110 S. Ct. at 1972. Yet the court below ruled that the Iran Claims Settlement Act was not enacted in

violation of the Origination Clause without reconciling this Court's most recent and controlling analysis of the Origination Clause. The court merely dismissed comparison with legislation from Munoz-Flores and earlier Origination Clause cases, stating that "Sperry confuses sufficiency with necessity." 925 F.2d at 401. As the dissent below notes, however, "[n]one of the facts critical to the outcome of these earlier cases is present here." 925 F.2d at 403; App. 18a (Mayer, J., dissenting). Indeed, all of this Court's reasoning in upholding legislation against Origination Clause challenges points to the inability of the Iran Claims Settlement Act to survive constitutional scrutiny.

1. Simultaneous Creation of the Program and Funding Mechanism.

First, the cases identify the simultaneous creation of a program along with the enactment of a revenue raising measure to support that program. In Munoz-Flores, the Victims of Crime Act set up not only the assessment, but an entire system of programs to assist crime victims in various ways. 42 U.S.C. §§ 10601-10605 (1988). The same bill simultaneously established the separate fund and authority for the assessments on persons convicted of crimes. See 18 U.S.C. § 3013 (1988); 42 U.S.C. § 10601 note (organic statute also enacted 18 U.S.C. § 3013). Likewise, this Court recognized that the revenue raising measures at issue in both Millard v. Roberts, 202 U.S. 429, 437 (1906), and Twin City National Bank Co. v. Nebeker, 167 U.S. 196 (1896), were "passed as part of a particular program

to provide money for that program." Munoz-Flores, 110 S. Ct. at 1973 (emphasis added). And in United States v. Norton, 91 U.S. 566 (1876), the act in question established a new postal money order system as well as the funding mechanism (deputy postmasters would keep part of the fees collected, as well as receive subsidies from the federal government, compensation for services).

Whereas the assessments at issue in Munoz-Flores and these earlier cases were one part of an organic statute that established an entire program, the Iran Claims Act deducts a percentage of awards purportedly to "recover costs" for a program that the executive branch had established and agreed to fund when it entered the Algiers Accords more than four years earlier.[9/] As Judge Mayer

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9/ When the President signed the Algiers Accords in 1981, Congress neither expressed its

below observed, "[u]nlike every other case in which the Supreme Court has sustained an act in the face of origination clause challenge, we have here two acts separated by several years." 925 F.2d 399; App. 21a (dissenting)(emphasis original; footnote omitted). The majority below neither distinguished nor explained its reason for departing from precedent.

2. Direction of Funds to the Program. Second, funds raised in earlier cases were segregated, earmarked or otherwise directed to the program they funded. In passing the Victims of Crime Act at issue in Munoz-Flores, Congress

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disapproval nor "enacted legislation or even passed a resolution indicating its displeasure with the [Accords]," Dames & Moore v. Regan, 453 U.S. 654, 687 (1981), including the government's agreement to be responsible for half of the costs of operating the Tribunal.

carefully required the establishment "in the Treasury [of] a separate account to be known as the Crime Victims Fund", 42 U.S.C. § 10601(a), to segregate funds from assessments on convicted criminals from the general Treasury account.[10/] In Millard, the proceeds generated by the statutes at issue went directly from the District of Columbia government to the railroads, which were required by the statutes to construct and improve railroad facilities necessary to build Union Station; the funds never passed through any agency of the Federal Government. In Nebeker, 167 U.S. at 199,

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10/ See also, e.g., 28 U.S.C. §§ 1914, 1931 (1988)(U.S. Court filing fees deposited in special account to fund operations of the courts); 35 U.S.C. § 42 (1988)(fees obtained from applicants to be used exclusively for funding the costs of filing and processing trademark applications); 39 U.S.C. § 2003 (1988)(postal revenues deposited in postal service fund for postal service use only).

203, the challenged legislation established a national currency and provided a funding mechanism to secure the currency and its administration by Treasury; the proceeds logically went directly to the Treasury, because that agency administers and guarantees the national currency. And in Norton, 91 U.S. 566, the bill allowed the deputy postmasters to keep up to one third of fees collected as compensation for services, with the remainder to go to the Treasury, which funded the postal service until the creation in this century of a separate Postal Service Fund.[11/] See 39 U.S.C. § 2003 (1988).

11/ The dissent below further notes that the legislation at issue in Norton was demonstrably not designed primarily to raise revenue because Congress appropriated significant additional sums to cover anticipated losses. See 925 F.2d at 403; App. 17a-18a.

In contrast, "[t]he Iran Claims Settlement Act neither creates a separate fund for the user fee proceeds, like the Crime Victims Fund in Munoz-Flores, nor otherwise earmarks the funds for the support of a particular program, as was true in fact if not in law of the exactions in Millard, Nebeker, and Norton." 925 F.2d at 403; App. 18a (Mayer, J., dissenting). Instead, the revenue generated by the Iran Claims Settlement Act "shall be deposited into the Treasury of the United States to the credit of miscellaneous receipts." 50 U.S.C. § 1701 note (Section 502(b)). There is no restriction or mechanism to channel any portion of these receipts to the Tribunal, and unlike the situations in Nebeker and Norton, the Treasury has no role in the administration of the program being funded -- the adjudication

of claims by the Tribunal. This commingling of the arbitral award deductions with all other "miscellaneous receipts" of the Treasury logically compels the conclusion that the statute "raises revenue to support the government generally". Munoz-Flores, 110 S. Ct. at 1972. Thus, the bill is one that raises revenue and is bound by the Origination Clause.

* * * * *

The Federal Circuit's opinion forges new constitutional ground. As the dissent below observed:

> Unlike Munoz-Flores and the earlier Supreme Court cases, here there is no separate fund or other earmarking of the revenue collected, and no simultaneous enactment of a program and its funding mechanism as part of a larger scheme. There is only rhetoric.

925 F.2d at 405; App. 25a.[12/] Only this Court, and not the lower courts, should apply its precedent so as to render the

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12/ The "rhetoric" to which Judge Mayer refers is the Government's repeated characterization of the deductions here as "reimbursement." This Court allowed that the Tribunal "made available to claimants such as Sperry sufficient benefits to justify the imposition of a reasonable user fee". 110 S. Ct. at 396; App. 42a. Yet a bill establishing "reimbursement" or "user fees" for pre-existing programs is clearly the kind of revenue-raising legislation which does not create revenue "incidentally" because, with the program already established, the sole purpose of the legislation is to generate revenue by collecting funds from citizens.

Further, there is no precedent to indicate that "user fee" statutes are per se exempt from the requirements of the Origination Clause. In the only decision which appears to address that issue, the Claims Court noted Congress' attention to the matter in determining that user fees must comply with the Origination Clause. Augusta Towing Co. v. United States, 5 Cl. Ct. 160 (1984). The court noted that a "user charge is one type of revenue measure." Id. at 167. However, the waterway usage fee at issue, which was alternately characterized as a "user charge" or "user tax," initially was passed as a Senate Bill but "ran aground" in the House on account of the Origination Clause. Id. at 168-69, n.5.

critical bases of earlier decisions irrelevant.

C. The Decision Below Threatens A Vital Element Of The Constitution's System Of Checks And Balances Between The Legislative Houses

Recently, this Court handed down its first significant case interpreting the Origination Clause in over seventy-five years. In United States v. Munoz-Flores, 110 S. Ct. 1964 (1990), the Court reaffirmed the continuing vitality of the Constitution's reservation to the House of Representatives the power to originate bills for raising revenue. The Court examined the roots of this command in the Constitution's overall scheme of checks and balances, and explained:

> [T]he Government's claim that compliance with the Origination Clause is irrelevant to ensuring individual rights is

> in error. This Court has repeatedly emphasized that '"the Constitution diffuses power the better to secure liberty."' . . .
>
> . . . At base, though, the Framers' purpose was to protect individual rights. . . . 'This power over the purse may, in fact, be regarded as the most complete and effectual weapon with which any constitution can arm the immediate representatives of the people. . . .' Provisions for the separation of powers within the Legislative Branch are thus not different in kind from provisions concerning relations between the branches; both sets of provisions safeguard liberty.

United States v. Munoz-Flores, 110 S. Ct. at 1970-71 (emphasis in original) (citations omitted); accord 110 S. Ct. at 1975 (Stevens and O'Connor, J.J., concurring). Thus, regardless of the exigencies of a particular situation, the dictate of the Origination Clause, like other components of the

constitutionally prescribed law making process, must strictly be obeyed.[13/]

The Court should grant the writ and consider this case because the opinion below threatens to eviscerate the Origination Clause, and undermine the clear import of Munoz-Flores. Although the Federal Circuit majority opinion declares that its ruling should not "be taken as suggesting a view that the Senate may constitutionally originate and enact revenue-raising bills so long as it merely describes such bills as 'user fees' or 'reimbursement' of

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13/ "A law passed in violation of the Origination Clause would thus be no more immune from judicial scrutiny because it was passed by both Houses and signed by the President than would be a law passed in violation of the First Amendment." 110 S. Ct. at 1972 (footnote omitted); accord Sperry Corp. v. United States, 925 F.2d at 406 (Mayer, J. dissenting) ("Congress must abide by the Constitution just like everybody else.")

governmental program expenses," 925 F.2d at 402 n.5, that is precisely the message of its ruling. The majority below provides no standard by which to judge whether Congress enacts a bill in violation of the Origination Clause, yet it upheld legislation that shares none of the characteristics of the legislation upheld by this court in Munoz-Flores or in prior cases against Origination Clause challenges, as discussed above. Such a ruling in effect eliminates the guidance that flows from this Court's prior opinions applying the Origination Clause to legislation.

If the opinion of the Federal Circuit guides future conduct of the Senate, then the Senate may initiate a "fee" or "reimbursement" on any pre-existing federal program (whether

enacted by the executive or legislative branch) and direct all proceeds into the general Treasury fund for the operation of government, so long as the Senate carefully avoids labeling its revenue-raising measure a "tax". For example, the Senate could decide to raise funds to offset the deficit by imposing additional "user fees" in the form of tolls upon motorists as they travel on the pre-established federal highway system. The Senate could legislate that all sums collected under this highway user fee program go straight into the Treasury with no restrictions on use.[14/] By any logical assessment, such tolls are a

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14/ Currently, Congress has imposed a general statutory ban against tolls on highways built with federal funds, 23 U.S.C. § 301 (1988), with narrow exceptions that strictly limit the use of any permissible tolls to paying off the cost of road construction. See, e.g., 23 U.S.C. § 129 (1988).

classic tax on motorists, but under the reasoning of the Federal Circuit, the measure would be outside the restraints of the Origination Clause.

As this example demonstrates, the opinion below effectively ignores this Court's prior rulings under the Origination Clause. The dissent below said it well:

> If the origination clause is to have any vitality, if, like the constitutional provisions about relations between the branches of government, it is truly to 'safeguard liberty,' see Munoz-Flores, 495 U.S. at ___, 110 S. Ct. at 1971, it must have teeth in a case where Congress adopts a tax years after the establishment of the program the tax is allegedly intended to finance, deposits the proceeds in a general Treasury fund, and admits through the statements of a legislative sponsor that the proceeds are really intended either to reduce the federal budget deficit or to support the operation of government generally. Congress

> can pass such an act, of course, but it must originate in the House of Representatives.

925 F.2d at 406; App. 29a-30a. This petition presents an opportunity to preserve the vitality of the Origination Clause, and to prevent the effective destruction of this Court's ruling in Munoz-Flores. See, e.g., Hutto v. Davis, 454 U.S. 370, 372 (1982)(Court grants certiorari because, after remand of case to court of appeals to consider recent ruling, court of appeals "failed to heed our decision."). If allowed to stand, the decision below will effectively write the Origination Clause out of the Constitution by judicial fiat. If Congress deems that result desirable, it may only accomplish such a goal by a properly enacted constitutional amendment.

CONCLUSION

This case does not present the question of whether the government may impose deductions on Tribunal awards, or whether the government may bargain away private claims in resolving international crises. The case also does not present a question as to the limits of Congress' power to tax. This petition simply gives the Court the opportunity to insure that Congress exercises its revenue-raising power in the manner chosen by the framers of the Constitution. The opinion below amends and re-draws the constitutionally-prescribed method for Congress to enact revenue-raising measures, and this Court should grant the petition to prevent this unconstitutional erosion of the Origination Clause.

Respectfully submitted,

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APPENDIX

APPENDIX A

SPERRY CORPORATION and Sperry World Trade, Inc., Plaintiffs-Appellants,

v.

The UNITED STATES, Defendant-Appellee.

No. 88-1009.

United States Court of Appeals, Federal Circuit.

Jan. 31, 1991.

Before MARKEY, Circuit Judge, COWEN, Senior Circuit Judge, and MAYER, Circuit Judge.

MARKEY, Circuit Judge.

The Sperry Corporation and Sperry World Trade, Inc., (Sperry)[1/] appeal from a judgment of the United States Claims Court holding, inter alia that the Iran Claims Settlement Act (Act)[2/]

1/ Sperry Corporation merged with Burroughs Corporation and the successor corporation is named UNISYS Corporation.

2/ Title V of the Foreign Relations Authorization Act, Fiscal Years 1986 and 1987, Pub. L. No. 99-93, §§ 501-05, 99 Stat. 437-39, 50

was not enacted in violation of the Origination Clause of the Constitution. Sperry Corp. v. United States, 12 Cl. Ct. 736 (1987). We affirm.

BACKGROUND

In the Claims Court opinion cited above, that court held that the Act did not constitute a taking under the Just Compensation clause of the Fifth Amendment and was not violative of the Origination Clause of the Constitution, Art. 1, § 7. Having reversed on the taking issue, this court declined to reach Sperry's Origination Clause arguments. Sperry Corp. v. United States, 853 F.2d 904 (Fed. Cir. 1988). The Supreme Court

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U.S.C. § 1701 note (Supp. IV 1986). We deal here only with the Iran Claims Settlement Act.

reversed, having determined that the Act's 1.5% deduction from awards of the Iran-United States Claims Tribunal (Tribunal) was a "reasonable user fee". The Court rejected Spery's Due Process and equal protection arguments and declined to reach the Origination Clause issue. United Sates v. Sperry Corp., ___ U.S. ___, 110 S. Ct. 387, 107 L. Ed.2d 290 (1989). The case is thus here on remand from the Supreme Court for consideration of Sperry's Origination Clause arguments.[3/]

OPINION

The Origination Clause reads: "All Bills for raising Revenue shall originate in the House of Representatives;

3/ The descriptions of the relevant facts in the opinions cited above make a repetition here unnecessary.

but the Senate may propose or concur with Amendments as on other Bills." U.S. Const. art. I, § 7.[4/] Sperry says the Act originated as a bill "for raising Revenue" because it: (1) created a deduction from Tribunal awards independently of and four years after the establishment of the Tribunal; and (2) had the raising of revenue as its primary purpose.

1. Independent Creation

Sperry asks us to apply a bright line standard under which a user fee originating in the Senate violates the

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4/ Sperry says the Act amends a House-originated bill that clearly was not a revenue raising bill. That the Senate was not here exercising its power under the Constitution to amend a revenue-raising bill, does not, however, mean that a bill that is not itself a revenue-raising bill may not originate in the Senate. The dispositive issue here is thus the nature of the bill that resulted in the Act.

Origination Clause whenever it is not established in the same legislation as that establishing the program to which the fee relates. However, the Supreme Court's caution against attempting a general statement to cover every possible phase in determining whether bills are violative of the Origination Clause, Twin City Bank v. Nebeker, 167 U.S. 196, 202, 17 S. Ct. 766, 768, 42 L. Ed. 134 (1896), is directly applicable to this case.

In citing United States v. Munoz-Flores, ___ U.S. ___, 110 S. Ct. 1964, 1972, 109 L. Ed.2d 384 (1990) for its statement that "a statute that creates a particular governmental program and that raises revenue to support that program, as opposed to a statute that raises revenue to support government generally, is

not a 'Bil[l] for raising Revenue' within the meaning of the Origination Clause", Sperry confuses sufficiency with necessity. That Munoz-Flores recognizes simultaneous creation of a service and a fee for its use as sufficient to render a Senate-originated user fee bill constitutionally permissible in a particular case does not mean that simultaneous creation is in every case a constitutional necessity.

In sum, the test under the Origination Clause is what was enacted, not when was the enactment. If a bill is not one for "raising revenue" it may originate in the Senate, and we are aware of no constitutional provision that would govern the timing of its enactment. The same, of course, is true of a bill that is one for "raising

revenue"; its enactment is constitutionally prohibited, regardless of its place in a legislative sequence. Simultaneous enactment of bills creating a service and assessing a fee may serve as some evidence that the invovled charge is a user fee, but the absence of simultaneous enactment cannot alone mandate a determination that the involved bill is one "for raising revenue".

2. Purpose of the Act

The Supreme Court has said: "revenue bills are those that levy taxes in the strict sense of the word, and are not bills for other purposes which may incidentally create revenue." Twin City Bank v. Nebeker, 167 U.S. 196, 202, 17 S. Ct. 766, 769, 42 L. Ed. 134 (1897). Sperry does not say the bill that led to the Act levied taxes but does say it was

not a bill for "other purposes" because its primary purpose was the raising of revenue. Sperry has shown no error, however, in the Claims Court holding that raising revenue was not the primary purpose of the bill that led to the Act.

Sperry's attempt to minimize these provisions of the bill that deal with other purposes must fail. It rests on assertions that some of those other purposes are inapplicable to Spery's present claim and that some others occupy fewer lines in the bill than does the deduction section. However, the nature of a litigant's claim cannot retroactively control the nature of a bill and line counting bears no relationship to the relative importance of sections of a bill. Indeed, applications of Sperry's reasoning would render the deduction

section less important, for it occupies fewer lines than do some other provisions. Sperry has simply not demonstrated that the deduction provision is of such "overwhelming importance" as to convert what was a bill establishing a user fee into a bill for raising revenue.

That the one and a half percent deductions are recovered as "miscellaneous receipts" into the United States Treasury does not of itself, as Sperry argues, require a holding that revenue raising was the Bill's primary purpose in this case. Providing funds to the general Treasury does not necessarily and in every instance make a bill one "for raising revenue." Munoz-Flores upheld a law which required funds collected beyond an annual cap to be

"deposited in the general fund of the Treasury." See 42 U.S.C. § 10601. Though the 1.5% deduction was here fully recoverable in the Treasury, we cannot accept that circumstance as sufficient to undermine or counter the purpose stated by Congress in the Act. As the Supreme Court said in United States v. Sperry, 110 S. Ct. at 392, "Section 502(a) states that these charges are to be deducted 'as reimbursement to the United States Government for expenses incurred in connection with the arbitration of claims of United States claimants against Iran before [the] Tribunal . . .'".5/

5/ Nothing here said should be taken as suggesting a view that the Senate may constitutionally originate and enact revenue raising bills so long as it merely describes such bills as "user fees" or "reimbursement" of governmental program expenses.

It may be that earmarking every user fee for payment directly into an account controlled by the agency rendering the service would or would not make easier the publication of a "regular Statement and Account of the Receipts and Expenditures of all public money", Const. Art. 1, Sec. 9, cl. 7. Such a practice might also aid the courts in identifying a user fee. But the in-bounds routing of government receipts is a matter for the Congress, not the courts, to decide, and, again, we are aware of no constitutional provision against recovery of user fees into the Treasury.

The judgment of the Claims Court is AFFIRMED.

MAYER, Circuit Judge, dissenting.

This case is not about whether Congress has authority to assess a user fee on private entities, like Sperry, that benefit from the Iran-United States Claims Tribunal. Nor is it about the extent to which the fee assessed must approximate the benefits received. The Supreme Court has settled both of those issues. United States v. Sperry Corp., 493 U.S. __, 110 S. Ct. 387, 107 L. Ed.2d 290 (1989). The question instead is whether the method Congress belatedly chose to implement the fee runs afoul of the origination clause of the Constitution. Because I believe the Iran Claims Settlement Act originated in the Senate as a bill intended primarily to raise revenue, notwithstanding the government's post hoc protestations to the contrary, I respectfully dissent.

The Supreme Court has consistently held that "bills for raising revenue" within the meaning of the origination clause "are those that levy taxes in the strict sense of the word, and are not bills for other purposes which may incidentally create revenue." United States v. Munoz-Flores, 495 U.S. ___, ___, 110 S. Ct. 1964, 1972, 109 L. Ed.2d 384 (1990); Millard v. Roberts, 202 U.S. 429, 436, 26 S. Ct. 674, 675, 50 L. Ed. 1090 (1906); Twin City Bank v. Nebeker, 167 U.S. 196, 202, 17 S. Ct. 766, 768, 42 L. Ed. 134 (1897); United States v. Norton, 91 U.S. 566, 569, 23 L. Ed. 454 (1876). "The Court has interpreted this general rule to mean that a statute that creates a particular governmental program and that raises revenue to support that program, as opposed to a statute that raises revenue to support

government generally, is not a 'Bil[l] for raising Revenue' within the meaning of the Origination Clause." Munoz-Flores, 495 U.S. at ___, 110 S. Ct. at 1972 (emphasis added).

Thus the special assessment on persons convicted of federal misdemeanors at issue in Munoz-Flores, 18 U.S.C. § 3013 (1982 & Supp. V 1987), did not violate the origination clause because it raised revenue primarily to support the simultaneously enacted Crime Victims Fund. 495 U.S. at __, 110 S. Ct. at 1972. A single statute, the Victims of Crime Act of 1984, established both the assessment and the Fund. Id. And though a portion of the assessments could be deposited in the general fund of the Treasury if Fund income exceeded a prescribed cap, the Court stressed that only one such excess occurred, that

only a small percentage of the excess could be attributed to the special assessments, and that Congress assumed neither the assessments themselves nor any excess would be substantial. Id. at __, 110 S. Ct. at 1973. The Court concluded, "As in Nebeker and Millard, then, the special assessment provision was passed as part of a particular program to provide money for that program . . . ." Id. (emphasis added).

Nebeker had upheld against an origination clause challenge "an act of Congress providing a national currency secured by a pledge of bonds of the United States, and which, in the furtherance of that object, and also to meet the expenses attending the execution of the act, imposed a tax on the notes in circulation of the banking associations organized under the

statute. . .." 167 U.S. at 202, 17 S. Ct. at 769 (emphasis added). Similarly, Millard rejected an origination clause challenge to a set of acts that levied taxes on private property in the District of Columbia to finance railroad improvements. Again the acts established funding mechanisms simultaneously with the programs Congress intended those mechanisms to support, and money thus raised went directly and exclusively to support the programs. The Court observed, "Whatever taxes are imposed are but means to the purposes provided by the act." 202 U.S. at 437, 26 S. Ct. at 675.

The Munoz-Flores Court could have highlighted a third case. In United States v. Norton, 91 U.S. 566, 569, 23 L. Ed. 454 (1876), the Court construed the phrase as equivalent to "'[b]ills

for raising revenue' [within the meaning of the origination clause] when enacted into laws." The act established a postal money-order system and provided that "all moneys received from the sale of money-orders, all fees received for selling them, and all moneys transferred in administering the act . . . 'be deemed and taken to be money in the treasury of the United States.'" Id. 91 U.S. at 568. It also authorized deputy-postmasters to withhold a portion of the revenue thus collected to compensate themselves and other clerks. Nevertheless, the Court held the act was not a revenue law. That the act appropriated $100,000 "to meet any deficiency in the amount of such proceeds during the first year" was critical to the decision-a "willingness . . . to sink money" suggesting that Congress' purpose

was, as avowed, "to promote public convenience, and to insure greater security in the transmission of money through the United States mails" rather than to raise revenue generally for the use of the government. Id.

None of the facts critical to the outcome of these earlier cases is present here. The Iran Claims Settlement Act neither creates a separate fund for the user fee proceeds, like the Crime Victims Fund in Munoz-Flores, nor otherwise earmarks the funds for the support of a particular program, as was true in fact if not in law of the exactions in Millard, Nebeker, and Norton. The Act and its user fee do not, like "the Victims of Crime Act and special assessment [at issue in Munoz-Flores,] virtually mirror the statutes approved in Twin City [Bank v. Nebeker], Norton, and

Millard." United States v. Simpson, 885 F.2d 36, 41 (3d Cir. 1989). Instead, deductions pursuant to sections 501(b)(2) and 502(a) are deposited to the credit of miscellaneous receipts in the Treasury. See 22 U.S.C. § 1626(b) (1988); Iran Claims Settlement Act, § 502(b), 50 U.S.C. § 1701 note (Supp. IV 1986).

More importantly, the Senate proposed and the Congress adopted the funding mechanism of the Iran Claims Settlement Algiers Accords established the "program allegedly intended to be supported. Contrary to the Claims Court's assertion, the Act was not "designed to provide a forum for United States nationals to litigate their claims against the government of Iran." 12 Cl. Ct. at 742. The Algiers Accords and implementing executive orders had

done that in 1981. See Sperry, 493 U.S. at ___, 110 S. Ct. at 395.[1/] Unlike

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1/ There is one category of claims for which the Act did potentially make available a "new" forum. Section 501(a) confers on the Foreign Claims Settlement Commission the authority "to receive and determine the validity and amounts of claims by nationals of the United States against Iran which are settled en bloc by the United States." See 22 U.S.C. §§ 1621-27. However, this "standby" forum - it becomes available only if Iran and the United States enter an en bloc settlement, at the time of the Act's passage a dubious prospect, see Iran Claims Legislation: Hearing on S. 771 and S. 1166 Before the Senate Comm. on Foreign Relations, 99th Cong., 1st Sess. 24 (1985) [Senate Hearings] - was not available to Sperry. The legislative history says that only claims worth less than $250,000 are subject to en bloc settlement, id. at 14, 24-25, "small claims" for which the Algiers Accords obligate the United States to act as agent before the Iran-United States Claims Tribunal. See Declaration of the Government of the Democratic and Popular Repulic of Algeria Concerning the Settlement of Claims by the Government of the United States of America and the Government of the Islamic Republic of Iran [Accord 2], art. III § 3, reprinted in 19 Bureau of Public Affairs, U.S. Department of State, Selected Papers (Mar. 12, 1981). Large claimants like Sperry can negotiate directly with the government of Iran and, if successful, formally resolve their disputes by requesting the Tribunal to record their settlement agreements as "awards on agreed terms"; they have no recourse to the Foreign Claims Settlement Commission.

every other case in which the Supreme Court has sustained an act in the face of origination clause challenge, we have here two acts[2/] separated by several years.

Again, the question is not whether Congress can retroactively impose the section 502 fee, whether the amount of the fee is reasonable, or whether only successful claimants like Sperry should in fairness pay it. The question is how Congress must adopt the fee to further its stated desire of "promot[ing] the prompt and efficient processing of claims made by U.S. citizens and

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2/ It is of no consequence that the first "act," the Algiers Accords, is embodied in a set of executive agreements. There is no doubt that the Accords could have included a specific mechanism for financing the United States' half share of Tribunal costs. Accord 2, art. VI § 3, see Dames & Moore v. Regan, 453 U.S. 654, 680-85, 101 S. Ct. 2972, 2987-90, 69 L. Ed.2d 918 (1981).

corporations against the Government of Iran," 131 Cong. Rec. S6489 (daily ed. May 17, 1985) (statement of Sen. Evans), when the institutional apparatus for doing so has long been in place. That Congress hastily enacted the fee in response to judicial invalidation of Treasury's earlier attempt to impose a similar fee, see id. at S6490; Sperry, 493 U.S. at __, 110 S. Ct. at 392, suggests that damage control, not cost control, was its animating force.

The Act's co-sponsor, Senator Evans, frankly admitted as much. On May 17, 1985, some two weeks after the Claims Court invalidated the Treasury Department's administratively imposed fee but before the court had entered final judgment, Senator Evans concluded his introduction of S. 1166, the Act's originating bill, this way:

> Our legislation would ensure that the bulk of the amounts recovered to date [through Treasury's Directive License, invalidated May 1, 1985 by the Claims Court], over $6 million, would remain in the Treasury. Further, it would guarantee that an additional $12 to $20 million in revenues, which the Department of State estimates would be collected under our bill, would go into the Treasury to offset the deficit.

131 Cong. Rec. S6490 (emphasis added). At a meeting of the Senate Foreign Relations Committee three days later, Senator Evans reiterated, "Chairman Lugar and I promised to move swiftly on a bill. Seldom, if ever, does the Foreign Relations Committee have an opportunity to restore funds to the public first [sic, fisc]. We pledged that this opportunity will not be lost." Senate Hearings at 2.

These statements are far more compelling than the legislative history

relied upon by the Ninth Circuit in Munoz-Flores - that Congress expected the special assessment to "constitute new income for the Federal government," United States v. Munoz-Flores, 863 F.2d 654, 658 (9th Cir. 1988) - but discounted by the Supreme Court because the passage from which the quoted statement came, "[r]ead in its entirety, . . . clearly evidences Congress' intent that [the assessment] provide funds primarily to support the Crimes Victims Fund." Munoz-Flores, 495 U.S. at ___, 110 S. Ct. at 1973. Not only are the statements themselves more illuminating; they are, by virtue of their source, entitled to substantial weight as evidence of Congress' true intent. FEA v. Algonquin SNG, Inc., 426 U.S. 548, 564, 96 S. Ct. 2295, 2304, 49 L. Ed.2d 49 (1976). Second, the context in which they were made

belies what Congress asserts in the statute as its motivation. Unlike Munoz-Flores and the earlier Supreme Court cases, here there is no separate fund or other earmarking of the revenue collected, and no simultaneous enactment of a program and its funding mechanism as part of a larger scheme. There is only rhetoric: section 502(a) states that the fees collected are intended to reimburse the government "for expenses incurred in connection with the arbitration of claims of United States claimants against Iran before th[e] Tribunal and the maintenance of the Security Account," and the legislative history is rife with references to the expenses borne by the government for the same purposes, see, e.g., 131 Cong. Rec. S6490; Senate Hearings at 14-15, 26-27. But no amount of post hoc

rationalization should obscure what the facts of this case clearly show - a naked attempt to raise revenue for general government purposes, belatedly placed in the context of supporting a particular program and shrewdly couched in the language of reimbursement for benefits conferred.

The Act's other provisions neither negate nor override its essential revenue-raising purpose. I have already mentioned section 501, which does not apply to Sperry but allows the Secretary of the Treasury to impose a similar fee on small claimants.[3/] Sections 503 and

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3/ The alternative fee for small claimants, assessed under the International Claims Settlement Act of 1949, as amended, is higher. See 50 U.S.C. § 1701 note, at § 501(a), (b)(2); 22 U.S.C. § 1626(b) (1988). That Act, unlike the Iran Claims Settlement Act, simultaneously created the International Claims Commission of the United States (later transferred from the Department of State to the Department of Justice and renamed the Foreign Claims Settlement

504 are merely technical. Section 503 prevents the duplicative assessment of fees on small claimants, while section 504 authorizes the Secretary of the Treasury to reimburse the Federal Reserve Bank of New York for expenses incurred as a fiscal agent of the United States in implementing the Algiers Accords. The Act's only other substantive provision, section 505, insures the confidentiality of Tribunal records. It reflects a congressional concern independent of, but decidedly secondary to, the revenue-raising function of section 502. It is apparent from the

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Commission, see 22 U.S.C. §§ 1622 note, 1622a (1982)) and its funding mechanism. See Pub. L. No. 455, ch. 54, 64 Stat. 12 (1949). Thus section 501(b)(2) provides for a discretionary decrease in fees long ago established and only potentially assessed against small claimants for use of the Foreign Claims Settlement Commission. It does not assess a new fee for use of the Iran-United States Claims Tribunal.

legislative history that Congress devoted far more attention to section 502 than to the other four sections of the Act combined. See, e.g., 131 Cong. Rec. S6489-90; Senate Hearings at 1-2, 13-32.

Nor do the fees imposed by section 502 further the purpose of any other sections of the Act. Section 501 does not apply to Sperry and, in any event, has its own preexisting fee scheme. The fees of section 502 do not provide the Federal Reserve Bank's reimbursement pursuant to section 504. The Bank makes the deductions required by section 502(a) and forwards them to Treasury; it is not authorized to retain any of the proceeds as reimbursement for its services. Finally, the exactions of section 502 obviously do not help maintain the confidentiality of Tribunal records pursuant to section 505.

The Act's omnibus character makes any attempt to determine its "primary purpose" misdirected if not disingenuous. The Act simply does not establish, nor is it a part of, a comprehensive statutory scheme of the type sustained in Munoz-Flores, Millard, Nebeker, and Norton - for me, profoundly persuasive that it violates the origination clause. If the origination clause is to have any vitality, if, like the constitutional provisions about relations between the branches of government, it is truly to "safeguard liberty," see Munoz-Flores, 495 U.S. at ___, 110 S. Ct. at 1971 it must have teeth in a case where-Congress adopts a tax years after the establishment of the program the tax is allegedly intended to finance, deposits the proceeds in a general Treasury fund, and admits through the statements of a

legislative sponsor that the proceeds are really intended either to reduce the federal budget deficit or to support the operation of government generally. Congress can pass such an act, of course, but it must originate in the House of Representatives. That is to say, Congress must abide by the Constitution just like everyone else.

Time and events may have eroded the conceptual underpinnings of the origination clause - that one can better protect his purse in the House than the Senate, see Munoz-Flores, 495 U.S. at ___, 110 S. Ct. at 1971 - but we should apply the Constitution as we find it, not as Congress thinks it should be. The Iran Claims Settlement Act raises revenue within the meaning of the origination clause; because the parties do not dispute that it originated in the

Senate and did not amend a House revenue-raising bill, it is unconstitutional.

APPENDIX B

SUPREME COURT OF THE UNITED STATES

No. 88-952

UNITED STATES, APPELLANT *v.* SPERRY CORPORATION ET AL.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

[November 28, 1989]

JUSTICE WHITE delivered the opinion of the Court.

Section 502 of the Foreign Relations Authorization Act, Fiscal Years 1986 and 1987, 99 Stat. 438, note following 50 U. S. C. § 1701 (1982 ed., Supp. V), requires the Federal Reserve Bank of New York to deduct and pay into the United States Treasury a percentage of any award made by the Iran-United States Claims Tribunal in favor of an American claimant before remitting the award to the claimant. We are asked to consider in this case whether § 502 violates the Just Compensation Clause or Due Process Clause of the Fifth Amendment[1] or the Origination Clause of Article I, § 7.[2]

I

Appellees Sperry Corporation and Sperry World Trade, Inc. (hereinafter Sperry)[3] are American corporations that entered into contracts with the Government of Iran prior to

[1] "No person shall . . . be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation." U. S. Const., Amdt. 5.

[2] "All Bills for raising Revenue shall originate in the House of Representatives; but the Senate may propose or concur with Amendments as on other Bills." U. S. Const., Art. I, § 7, cl. 1.

[3] Sperry World Trade, Inc., is a wholly owned subsidiary of Sperry Corporation. Subsequent to the commencement of this action, Sperry Corporation merged with Burroughs Corporation. The successor corporation was renamed as UNISYS Corporation. Brief for Appellees 1, n. 1.

the seizure of the United States Embassy in Tehran on November 4, 1979. The details of the seizure of the Embassy and diplomatic personnel and the ensuing diplomatic crisis want no repetition here. We need address only the means eventually established by the Governments of the United States and Iran to resolve claims by American companies against Iran.

On November 14, 1979, President Carter issued Executive Order No. 12170, blocking the removal or transfer of all property of the Government of Iran subject to American jurisdiction. 3 CFR 457 (1980). One day later, the Secretary of the Treasury issued regulations invalidating any attachment affecting Iranian property covered by the Executive Order unless the attachment was licensed by the Secretary. 31 CFR § 535.203(e) (1980). The regulations provided that any such license could be "amended, modified, or revoked at any time." § 535.805. On November 26, 1979, the President granted a general license authorizing judicial proceedings against Iran but not the "entry of any judgment or of any decree or order of similar or analogous effect . . . ." § 535.504(b)(1). A subsequently issued regulation made clear that the President's license authorized prejudgment attachments. § 535.418.

As part of the resolution of the diplomatic crisis, the United States and Iran entered into an agreement embodied in two declarations of the Government of Algeria commonly referred to as the Algiers Accords (hereinafter the Accords). App. 29–42. The Accords provided for the establishment in The Hague of an international arbitral tribunal, known as the Iran–United States Claims Tribunal (hereinafter the Tribunal), to hear claims brought by Americans against the Government of Iran. The establishment of the Tribunal was to preclude litigation by Americans against Iran in American courts, so the United States undertook to terminate such legal proceedings, unblock Iranian assets in the United

States, and nullify all attachments against those assets. *Id.*, at 30. To implement the Accords, President Carter issued a series of Executive Orders on January 19, 1981, revoking all licenses permitting the exercise of "any right, power, or privilege" with respect to Iranian funds and annulling all non-Iranian interests in Iranian assets acquired after the blocking order. Exec. Orders Nos. 12276–12285, 3 CFR 104–118 (1981). On February 24, 1981, President Reagan issued an Executive Order suspending all claims that "may be presented to the . . . Tribunal" and providing that such claims "shall have no legal effect in any action now pending in any court of the United States." Exec. Order No. 12294, 3 CFR 139 (1981). This Court upheld the revocation of the licenses and the suspension of the claims in *Dames & Moore* v. *Regan*, 453 U. S. 654 (1981).

Prior to the Accords, Sperry had filed suit against Iran in the United States District Court for the District of Columbia and had obtained a prejudgment attachment of blocked Iranian assets, but the Executive Orders sustained in *Dames & Moore* invalidated that attachment and prohibited Sperry from further pursuing its claims against Iran in any American courts. Sperry therefore filed a claim against Iran with the Tribunal and also began settlement negotiations with Iran. In February 1982, Sperry and Iran reached an agreement requiring the payment by Iran to Sperry of $2.8 million. The Government of Iran gave the settlement final approval on July 8, 1982.

Sperry and Iran then filed a joint application with the Tribunal, which was granted, to have the settlement entered as an "Award on Agreed Terms." The entry of the settlement provided Sperry with a significant benefit, for it gave the settlement agreement the status of an award by the Tribunal, and under the Accords, all awards of the Tribunal are "final and binding" and are "enforceable . . . in the courts of any nation in accordance with its laws." App. 40. The entry of

the settlement also enabled Sperry to make use of the mechanism established by the Accords and the implementing Executive Orders for the payment of arbitral awards. As part of the Accords, $1 billion of the unblocked Iranian assets had been placed in a Security Account in the Bank of England for the payment of awards. *Id.*, at 33. Awards made by the Tribunal in favor of American claimants are paid from the Security Account to the Federal Reserve Bank of New York, which then pays the awards to the claimants. See 47 Fed. Reg. 25243 (1982).

We come now to the heart of this dispute. The Accords provided that "[t]he expenses of the Tribunal shall be borne equally by the two governments." App. 41. On June 7, 1982, the Department of the Treasury issued a "Directive License" requiring the Federal Reserve Bank of New York to deduct 2% from each award certified by the Tribunal and to pay the deducted amount into the Treasury "to reimburse the United States Government for costs incurred for the benefit of U. S. nationals who have claims against Iran." 47 Fed. Reg. 25243. When the Federal Reserve Bank of New York received Sperry's award, it deducted the 2% charge over Sperry's protest, deposited the charge in the Treasury, and paid Sperry the balance of its award.

Sperry filed suit in the United States Claims Court, contending that the 2% charge was unconstitutional and was not (as the United States argued) authorized by the Independent Offices Appropriation Act, 1952 (IOAA), 65 Stat. 290, 31 U. S. C. § 483a (1976 ed.).[4] The Claims Court held in an oral ruling on May 1, 1985, that the Directive License violated IOAA. App. to Juris. Statement 26a–51a. Congress reacted swiftly by enacting § 502, which specifically requires the assessment of a charge against successful American claimants before the Tribunal and directs the Federal Reserve Bank of New York to deduct from Tribunal awards

[4]Title 31 was recodified in 1982, and IOAA is now to be found at 31 U. S. C. § 9701 (1982 ed.).

paid out of the Security Account an amount equal to 1¼% of the first $5,000,000 and 1% of any amount over $5,000,000. Section 502(a) states that these charges are to be deducted "as reimbursement to the United States Government for expenses incurred in connection with the arbitration of claims of United States claimants against Iran before [the] Tribunal and the maintenance of the Security Account established pursuant to the [Accords]." Congress made § 502 effective retroactive to June 7, 1982, the date on which the Treasury had issued the Directive License struck down by the Claims Court. See § 502(d).

Sperry renewed its challenge to the deduction in the Claims Court, arguing that the 1¼% deduction authorized by § 502 was unconstitutional. The Claims Court rejected the constitutional claims and dismissed Sperry's suit. 12 Cl. Ct. 736 (1987). The Court of Appeals for the Federal Circuit reversed and held that § 502 was unconstitutional as it caused a taking of Sperry's private property without just compensation. 853 F. 2d 904 (1988). The Court of Appeals likened the 1¼% deduction by the Federal Reserve Bank of New York to the permanent physical occupation by the Government of private property which, this Court held in *Loretto* v. *Teleprompter Manhattan CATV Corp.*, 458 U. S. 419, 441 (1982), is always a "taking" requiring just compensation. The Court of Appeals was unmoved by the United States' argument that there was no taking given the benefits that Sperry had obtained from the Tribunal: "[W]e do not see the benefit of the Tribunal to Sperry when prior to the Accords it had secured the attachment of Iranian assets sufficient to cover its eventual award and, had the President not suspended American claims, would have had no need for the Tribunal." 853 F. 2d, at 908.

The United States invoked our appellate jurisdiction under the version of 28 U. S. C. § 1252 (1982 ed.) in effect before its

amendment in 1988.[5] We noted probable jurisdiction, 489 U. S. —— (1989), and we now reverse.

II

Sperry argues that the deduction is a part of Congress' scheme to shift to American claimants against Iran those costs of settling the diplomatic crisis that should have been borne by the Nation as a whole. As we see it, however, Sperry has not identified any of its property that was taken without just compensation. To the extent the Court of Appeals' decision may be read as concluding that Sperry suffered a taking of its property because its prejudgment attachment against Iranian assets was nullified by the Executive Orders implementing the Accords, see 853 F. 2d, at 907, that conclusion is incorrect; we held in *Dames & Moore* v. *Regan*, 453 U. S., at 674, n. 6, that American litigants against Iran had no property interest in such attachments. Nor did Sperry suffer the deprivation of its claim against Iran. Sperry presented its claim to the Tribunal and settled the claim for a substantial sum.[6] And we note that Sperry makes no claim that the gross amount of the award was less

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[5] Section 1252 permitted a direct appeal to this Court from "an interlocutory or final judgment, decree or order of any court of the United States . . . holding an Act of Congress unconstitutional in any civil action, suit, or proceeding to which the United States . . . is a party." Congress eliminated most of this Court's appellate jurisdiction, including that based on § 1252, in Public Law 100-352, 102 Stat. 662, which was enacted on June 27, 1988. However, § 7 of Public Law 100-352 provides that the statute "shall take effect ninety days after the date of the enactment of this Act," i. e., on September 25, 1988, and shall not "affect the right to review or the manner of reviewing the judgment or decree of a court which was entered before such effective date." *Id.*, at 664. The judgment of the Court of Appeals was entered on August 10, 1988, before the effective date of Public Law 100-352. The appeal is therefore proper. See also *Duquesne Light Co.* v. *Barasch*, 488 U. S. ——, ——, n. 4 (1989).

[6] Sperry's ability to pursue its claim against Iran in another forum distinguishes this case from *Gray* v. *United States*, 21 Ct. Cl. 340 (1886). In the treaty at issue in *Gray*, the United States canceled American claims against France altogether. *Id.*, at 393.

than what would have been recovered in ordinary litigation and that being forced to take the lesser amount was an unconstitutional taking of property. The case thus turns only on the consitutionality of the deduction.

As for the deduction itself, the United States urges that it is not a taking at all but is a reasonable "user fee" assessed against claimants before the Tribunal and intended to reimburse the United States for its costs in connection with the Tribunal. Sperry responds that the § 502 charge cannot be upheld as a user fee because there has been no showing that the amount of the deduction approximates the cost of the Tribunal to the United States or bears any relationship to Sperry's use of the Tribunal or the value of the Tribunal's services to Sperry. None of Sperry's submissions is persuasive.

Section 502(a) specifically states that the deductions are made as "reimbursement to the United States Government for expenses incurred in connection with the arbitration of claims of United States claimaints against Iran before [the] Tribunal and the maintenance of the Security Account . . . ." Given especially this specific declaration by Congress that the deductions are intended to reimburse costs incurred by the United States, the burden must lie with Sperry to demonstrate that the reality of § 502 belies its express language before we conclude that the deductions are actually takings. Cf. *Pittsburgh* v. *Alco Parking Corp.*, 417 U. S. 369, 375–376 (1974). That burden has not been met.

This Court has never held that the amount of a user fee must be precisely calibrated to the use that a party makes of government services. Nor does the Government need to record invoices and billable hours to justify the cost of its services. All that we have required is that the user fee be a "fair approximation of the cost of benefits supplied." *Massachusetts* v. *United States*, 435 U. S. 444, 463, n. 19 (1978). In that case, the Court upheld a flat registration fee assessed by the Federal Government on civil aircraft, including air-

craft owned by the States, against a challenge that the fee violated the principle of intergovernmental tax immunity. In holding that the registration charge could be upheld because it was a user fee rather than a tax, the Court rejected Massachusetts' argument that the "amount of the tax is a flat annual fee and hence is not directly related to the degree of use of the airways." *Id.*, at 463. The Court recognized that when the Federal Government applies user charges to a large number of parties, it probably will charge a user more or less than it would under a perfect user-fee system, but we declined to impose a requirement that the Government "give weight to every factor affecting appropriate compensation for airport and airway use," *id.*, at 468.[1]

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[1]Sperry urges, however, that *American Trucking Assns., Inc.* v. *Scheiner*, 483 U. S. 266 (1987), compels invalidation of the deduction here. In that case, the Court rejected Pennsylvania's argument that flat truck registration fees and axle taxes did not violate the Commerce Clause because they were imposed as user fees to reimburse Pennsylvania for the costs of highway maintenance. The Court stated that "Pennsylvania's flat taxes . . . discriminate against out-of-state vehicles by subjecting them to a much higher charge per mile traveled in the State, and they do not even purport to approximate fairly the cost or value of the use of Pennsylvania's roads." *Id.*, at 290.

The reasoning of *American Trucking Assns.* cannot be extended outside the context of the Commerce Clause. The Court there was faced with particular constitutional restrictions on fees and taxes not present in this case, that a fee charged by a State not discriminate against out-of-state vehicles and not place an undue burden on interstate commerce. The flat taxes were objectionable because, even though they were facially neutral, their effect was to subject out-of-state vehicles, which traveled on average much fewer miles inside Pennsylvania than did in-state vehicles, to a much higher charge per mile traveled. The taxes failed what we have described as the "internal consistency" requirement of the Commerce Clause. *Id.*, at 282–287; see also *Tyler Pipe Industries, Inc.* v. *Washington State Department of Revenue*, 483 U. S. 232, 247 (1987). There is no similarly exacting requirement under the Just Compensation Clause. On the contrary, the Just Compensation Clause "has never been read to require the . . . courts to calculate whether a specific individual has suffered burdens . . . in excess of the benefits received" in determining whether a "taking"

The deductions authorized by § 502 are not so clearly excessive as to belie their purported character as user fees. This is not a situation where the Government has appropriated all, or most, of the award to itself and labeled the booty as a user fee. Cf. *FCC* v. *Florida Power Corp.*, 480 U. S. 245, 253 (1987); *Webb's Fabulous Pharmacies, Inc.* v. *Beckwith*, 449 U. S. 155 (1980).[8] We need not state what percentage of the award would be too great a take to qualify as a user fee, for we are convinced that on the facts of this case, 1⅓% does not qualify as a "taking" by any standard of excessiveness. This was obviously the judgment of Congress and we abide by it.[9]

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has occurred. *Keystone Bituminous Coal Assn.* v. *DeBenedictis*, 480 U. S. 470, 491, n. 21 (1987).

[8] In *Webb's Fabulous Pharmacies, Inc.* v. *Beckwith*, the Court struck down a Florida statute appropriating interest on funds deposited into a court registry by an interpleader complainant. Florida law provided for both the deduction of a small percentage of the interpleader funds as a fee for services rendered by the clerk of the court and the deduction of interest earned on the funds. "It is obvious that the interest was not a fee for services, for any services obligation to the county was paid for and satisfied by the substantial fee charged . . . and described specifically . . . as a fee 'for services' by the clerk's office." 449 U. S., at 162. We failed to discern any justification for the deduction of the interest other than the bare transfer of private property to the county. We expressed "no view as to the constitutionality of a statute that prescribes a county's retention of interest earned, where the interest would be the only return to the county for services it renders," *id.*, at 165, a situation more analogous to the case at bar.

[9] Sperry argues, however, that we should not even consider the amount deducted by the Federal Reserve Bank of New York because the deduction was akin to a "permanent physical occupation" of its property and therefore was a *per se* taking requiring just compensation, regardless of the extent of the occupation or its economic impact. See *Loretto* v. *Teleprompter Manhattan CATV Corp.*, 458 U. S. 419, 441 (1982). The Court of Appeals agreed with Sperry. 853 F. 2d 904, 906–907 (CA Fed. 1988). It is artificial to view deductions of a percentage of a monetary award as physical appropriations of property. Unlike real or personal property, money is fungible. No special constitutional importance attaches to the fact that the Government deducted its charge directly from the award rather than requiring Sperry to pay it separately. If the deduction in this case was a physical occupation requiring just compensation, so would be

Sperry complains that the United States has taken its property by charging it for the use of procedures that it has been forced to use, or at least that it would rather not have used. But as we have explained *supra*, at ——, a reasonable user fee is not a taking if it is imposed for the reimbursement of the cost of government services. "A governmental body has an obvious interest in making those who specifically benefit from its services pay the cost . . . ." *Massachusetts* v. *United States*, *supra*, at 462 (opinion of BRENNAN, J.). Though we may accept Sperry's word that it would have preferred to pursue its action against Iran in the familiar and proximate federal district courts, we cannot accept its contention that it did not benefit in any way from the procedures established by the Accords. The fact is that Sperry did benefit directly from the existence and functions of the Tribunal. The Accords that established the Tribunal and the Executive Orders that implemented the Accords assured Sperry that any award made to it whether the result of a settlement or otherwise could be enforced in the courts of any nation and actually paid in this country. Had the President not agreed to the establishment of the Tribunal and the Security Account, Sperry would have had no assurance that it could have pursued its action against Iran to judgment or that a judgment would have been readily collectible. As it was, Sperry filed its claim with the Tribunal, arrived at a settlement with Iran, and had the settlement entered as a formal award by the Tribunal, which was paid in full except for the deduction at issue in this case.

It is not at all dispositive that the award to Sperry was more the result of private negotiations between Sperry and Iran than the Tribunal procedures placed at Sperry's disposal. Sperry filed its claim with the Tribunal and had a formal award entered. Furthermore, Sperry may be required to pay a charge for the availability of the Tribunal even if it

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any fee for services, including a filing fee that must be paid in advance. Such a rule would be an extravagant extension of *Loretto*.

never actually used the Tribunal; Sperry received the "benefit from [the Tribunal] in the sense that the services are available for [its] use." *Massachusetts* v. *United States*, 435 U. S., at 468; see also *Clyde Mallory Lines* v. *Alabama ex rel. State Docks Comm'n*, 296 U. S. 261, 266–267 (1935). Had Sperry's negotiations with Iran failed, it would have then had the opportunity to use the hearing rooms, translation facilities, and facilities for service of documents made available through the Tribunal and the State Department. The Tribunal made available to claimants such as Sperry sufficient benefits to justify the imposition of a reasonable user fee.

III

We turn next to Sperry's due process claims. Sperry urges that § 502 violates the Due Process Clause because the deductions apply to awards, such as Sperry's, made by the Tribunal prior to the enactment of the statute. Our standard of review is settled:

> "[R]etroactive legislation does have to meet a burden not faced by legislation that has only future effects. 'It does not follow . . . that what Congress can legislate prospectively it can legislate retrospectively. The retroactive aspects of legislation, as well as the prospective aspects, must meet the test of due process, and the justifications for the latter may not suffice for the former.' But that burden is met simply by showing that the retroactive application of the legislation is itself justified by a rational legislative purpose." *Pension Benefit Guaranty Corporation* v. *R. A. Gray & Co.*, 467 U. S. 717, 730 (1984) (quoting *Usery* v. *Turner Elkhorn Mining Co.*, 428 U. S. 1, 16–17 (1976)) (citaton omitted).

We agree with the United States that the retroactive application of § 502 is justified by a rational legislative purpose. Retroactive application of § 502 ensures that all successful claimants before the Tribunal are treated alike in that

all have to contribute toward the costs of the Tribunal. If Congress had made the application of § 502 prospective only, the costs of the Tribunal would have fallen disproportionately on the claimants whose awards, for whatever reason, were delayed, and Congress might have had to increase the percentage charge on those claimants to recoup a sufficient portion of the Federal Government's costs. Claimants who were fortunate enough to obtain awards prior to the enactment of the statute would have obtained a windfall by avoiding contribution. It is surely proper for Congress to legislate retrospectively to ensure that costs of a program are borne by the entire class of persons that Congress rationally believes should bear them. Cf. *Pension Benefit Guaranty Corporation* v. *R. A. Gray & Co.*, *supra*, at 730; *Usery* v. *Turner Elkhorn Mining Co.*, *supra*, at 18.

Nor does § 502 violate the equal protection component of the Due Process Clause[10] because it assesses a user fee only against claimants who have actually received an award from the Tribunal and not against all claimants before the Tribunal. The classification implicitly made by § 502 neither burdens fundamental constitutional rights nor creates suspect classifications, so again our standard of review is that of rationality. See *United States Railroad Retirement Board* v. *Fritz*, 449 U. S. 166, 174–175 (1980). Congress could have rationally concluded that only those who are successful before the Tribunal realize a benefit therefrom sufficient to justify assessment of a fee. Congress could also have determined that assessing a user fee against all claimants would undesirably deter those whose claims were small or uncertain of success from presenting them to the Tribunal. This case is wholly unlike *Rinaldi* v. *Yeager*, 384 U. S. 305 (1966), where the Court was unable to discern any legitimate interest that was served by a requirement that the State be reimbursed for the cost of criminal trial transcripts by incarcerated pris-

[10] See *Bolling* v. *Sharpe*, 347 U. S. 497, 499 (1954).

oners unsuccessful in their appeals but not by other indigent appellants, even other unsuccessful ones who had not been incarcerated. Here the costs are imposed on only the successful claimants, not, as in *Rinaldi*, only the unsuccessful ones, a situation presenting entirely different considerations. Moreover, as discussed *supra*, at ——, a sensible distinction may be made between successful claimants who have completed the Tribunal proceedings and all other claimants.

IV

As a final ground for affirming the judgment below, Sperry relies on an argument presented to but not passed on by the Court of Appeals, *i. e.*, that § 502 was enacted in violation of the Origination Clause of Article I, § 7, which provides that "[a]ll Bills for raising Revenue shall originate in the House of Representatives; but the Senate may propose or concur with Amendments as on other Bills." Sperry refers us to the legislative history of the Foreign Relations Authorization Act, which indicates that § 502 was added as a Senate amendment to a bill that contained no revenue-raising provisions when it originated in the House.

We do not reach the merits of this contention. In another case to be argued this Term, we have directed the parties to brief whether claims based on the Origination Clause present nonjusticiable political questions. See *United States* v. *Munoz-Flores*, 493 U. S. —— (1989) (order granting certiorari); cf. *INS* v. *Chadha*, 462 U. S. 919, 940–943 (1983); *Baker* v. *Carr*, 369 U. S. 186, 217 (1962). Although this Court has on prior occasions appeared to address the merits of Origination Clause claims, see, *e. g.*, *Flint* v. *Stone Tracy Co.*, 220 U. S. 107, 143 (1911); *Millard* v. *Roberts*, 202 U. S. 429 (1906); *Twin City Bank* v. *Nebeker*, 167 U. S. 196 (1897), it would be inappropriate for us to do so now, before we decide the threshold question of justiciability in *Munoz-Flores*. Furthermore, even assuming that Origination Clause claims are justiciable, we would benefit from the views of the Court

of Appeals, which found it unnecessary to address the Origination Clause issue. Accordingly, the judgment of the Court of Appeals is reversed, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

No. 88-1009
D.C. No. CV-85-6433-E

SPERRY CORPORATION AND SPERRY WORLD TRADE, INC.,
PLAINTIFFS-APPELLANTS

v.

UNITED STATES, DEFENDANT-APPELLEE

Decided: Aug. 10, 1988

Before: MARKEY, Chief Judge, COWEN, Senior Circuit Judge, and MAYER, Circuit Judge.

OPINION

MAYER, Circuit Judge.

Sperry Corporation and Sperry World Trade, Inc. (Sperry) appeal the judgment of the United States Claims Court, 12 Cl. Ct. 736 (1987), upholding the constitutionality of the Iran Claims Settlement Act, which requires the United States to make a deduction from awards of the Iran-United States Claims Tribunal. Because the deduction is a taking in violation of the fifth amendment of the Constitution, we reverse.

Background

On November 4, 1979, Iranian nationals seized the United States Embassy in Tehran, Iran, and took American citizens there as hostages. In response, ten days later President Carter declared a national emergency under the International Emergency Economic Powers Act, 50 U.S.C. §§ 1701-06, and issued an executive order blocking the removal or transfer of "all property and interests in property of the Government of Iran, its instrumentalities and controlled entities and the Central Bank of Iran which are or become subject to the jurisdiction of the United States." Exec. Order No. 12170, 3 C.F.R. 457 (1980).

In July of 1980, Sperry filed suit against Iran and fifteen of its instrumentalities in United States district court alleging breach of contract, conversion of property, and interference with business relations. It obtained a prejudgment attachment of approximately $7 million against Iranian assets in the United States. *Sperry Corp. v. Islamic Republic of Iran,* No. 80-1614 (D.D.C. Oct. 24, 1980).

On January 19, 1981, the United States and Iran entered into a series of agreements, commonly known as the Algiers Accords, to end the hostage crisis and resolve other disputes between the two countries. A stated "purpose" of the Accords was "to terminate all litigation as between the Government of each party and the nationals of the other, and to bring about the settlement and termination of all such claims through binding arbitration." Declaration of the Government of the Democratic and Popular Republic of Algeria, *reprinted in* 19 Selected Documents, Bureau of Public Affairs, U.S. Department of State 2, 3 (Mar. 12, 1981). To this end, the Accords called for the establishment of the Iran-United States Claims Tribunal (Tribunal) to hear claims against Iran by

United States nationals. Awards by the Tribunal are "final and binding" and come from a "Security Account" established by Iran with an initial deposit of $1 billion, and in which Iran promised to maintain a minimum balance of $500 million until all Tribunal awards are paid. The United States agreed "to terminate all legal proceedings in United States courts involving claims of United States persons and institutions against Iran and its state enterprises, to nullify all attachments and judgments obtained therein, to prohibit all further litigation based on such claims, and to bring about the termination of such claims through binding arbitration." *Id.* The United States also agreed to transfer all Iranian assets held in the United States to Iran. Presidents Carter and Reagan issued executive orders implementing these terms, Exec. Order Nos. 12276-12285, 12294, 3 C.F.R. 104-118, 139-140 (1982), and the Supreme Court upheld them in *Dames & Moore v. Regan,* 453 U.S. 654 (1981), which contains a comprehensive description and discussion of this program.

Sperry filed a claim with the Tribunal and entered into settlement negotiations with the Iranian government. A settlement paying Sperry $2.8 million received final approval from Iran in July 1982 and the Tribunal entered an award to that effect in September. The United States, however, deducted two percent from the award pursuant to a June 7, 1982 directive license issued by the Secretary of Treasury. 47 Fed. Reg. 25243. The stated rationale for the deduction, which was authorized by the directive license only after the deadline for filing claims with the Tribunal and after Sperry and Iran had agreed in principal to settle the claims, was to "reimburse the United States Government for costs incurred for the benefit of U.S. nationals who have claims against Iran." *Id.*

Sperry promptly filed suit in the United States Claims Court alleging that the fees were "illegally exacted" and requesting that the directive license be invalidated. In a May 1, 1985 bench ruling, the court held the directive license unlawful and ordered return of the deduction. The court reasoned that under 31 U.S.C. § 9701, the Department of Treasury improperly charged for services provided by the Departments of State and Justice and that the government could not justify the decision to make a two percent deduction in the absence of evidence that the deduction was a reasonable attempt to match benefits and costs.

Before the Claims Court issued a written opinion or entered final judgment, and in response to the bench ruling, in August of 1985 Congress enacted the Iran Claims Settlement Act (Act), Pub. L. No. 99-93, Title V, §§ 501-505, 99 Stat. 437 (codified at 50 U.S.C. § 1701 note), which became Title V of the Foreign Relations Authorization Act, Fiscal Years 1986 and 1987. Section 502 of the Act provides for deductions of 1.5 percent from Tribunal awards of up to $5 million and of one percent on amounts in excess of $5 million. According to the Act, these deductions are "reimbursement to the United States Government for expenses incurred in connection with the arbitration of claims of United States claimants against Iran before that Tribunal and the maintenance of the Security Account." The deductions were to be applied retroactively to the date the directive license was issued, June 7, 1982.

Shortly thereafter, the government suggested that the Iran Claims Settlement Act had mooted the case. Sperry responded that the Act is unconstitutional because it caused a taking of property in violation of the fifth amendment; denied Sperry equal protection of law by assessing only successful claimants; violated the origina-

tion clause, art. I, § 7, cl. 1, because it was revenue legislation originating in the Senate rather than the House of Representatives; and denied Sperry due process by its retroactivity. The Claims Court rejected these arguments and dismissed the case. Sperry reasserts them here.

Discussion

Under the fifth amendment, "private property [shall not] be taken for public use, without just compensation." But the Supreme Court has yet to develop "any set formula for identifying a 'taking,' " *Connolly v. Pension Benefit Guaranty Corp.*, 475 U.S. 211, 224 (1986), so courts "[o]rdinarily . . . must engage in 'essentially ad hoc, factual inquiries' " of the circumstances of each case. *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 426 (1982) (emphasis added). In the perhaps usual case where governmental activities must be assessed to see if they so impair private property rights as to amount to a taking, these "inquiries" are guided by three factors of "particular significance." They are "(1) 'the economic impact of the regulation on the claimant'; (2) 'the extent to which the regulation has interfered with distinct investment-backed expectations'; and (3) 'the character of the governmental action.' " *Connolly*, 475 U.S. at 225 (quoting *Penn Central Transportation Co. v. New York City*, 438 U.S. 104, 124 (1978)). But this multifactor test is not invoked when there is a permanent physical occupation of property, *Loretto*, 458 U.S. at 432; *see Nollan v. California Coastal Comm'n*, 107 S.Ct. 3141, 3145 (1987), which the Supreme Court has called a *per se* taking. *Loretto*, 458 U.S. at 433; *see FCC v. Florida Power Corp.*, 107 S.Ct. 1107, 1111, 1112 (1987).

Loretto said "that a permanent physical occupation is a government action of such a unique character that it is a

taking without regard to other factors that a court might ordinarily examine." 458 U.S. at 432. In that event, the character of the governmental action is "determinative" of whether a taking has occurred, *id.* at 426, "without regard to whether the action achieves an important public benefit or has only minimal economic impact on the owner." *Id.* at 434. The degree of impairment is relevant only to the amount of compensation due, not to whether or not there has been a taking. *Id.* at 437.

The case we have is a dispute over money which the government has permanently appropriated for its own use. The fifth amendment by its terms applies to all "private property," not only real property, as the government seems to believe. *See PruneYard Shopping Center v. Robins,* 447 U.S. 74, 82 n.6 (1980). "Property rights in a physical thing have been described as the rights 'to possess, use and dispose of it.' " *Loretto,* 458 U.S. at 435 (quoting *United States v. General Motors Corp.*, 323 U.S. 373, 378 (1945)). No one doubts that Sperry has lost these rights.

The government action here is akin to that in *Webb's Fabulous Pharmacies, Inc. v. Beckwith,* 449 U.S. 155 (1980), in which interest earned on funds paid by an interpleader complainant into the registry of a court pending disbursal to claimants was kept by the goverment. The Supreme Court said the government's "appropriation" of the interest is "analogous to the appropriation of the use of private property in *United States v. Causby,* 328 U.S. 256 (1946)," a physical invasion case, and is a taking. 449 U.S. at 163. The Court has also observed that " 'the multifactor inquiry [is] generally applicable to *non-possessory* governmental activity.' " *Florida Power Corp.*, 107 S.Ct. at 1112 (quoting *Loretto,* 458 U.S. at 440) (emphasis added). We have a permanent, possessory activity

by the government, so the *per se* approach of *Loretto* guides our decision.*

Dames & Moore v. Regan, 453 U.S. 654 (1981), upheld the President's authority to nullify the attachments of Iranian assets, order the transfer of the assets to Iran, and suspend claims in courts of the United States. It also said there is jurisdiction under the Tucker Act, 28 U.S.C. § 1491, to determine if the suspension of claims had led to a taking, *id.* at 689, notwithstanding 28 U.S.C. § 1502, which limits jurisdiction over claims arising out of treaties. We see this case as challenging an act of Congress, independent of any claim based on the Accords. So the Court's observation about section 1502 is not implicated.

Sperry had a prejudgment attachment of about $7 million in the district court against Iranian assets in the United States. It eventually was awarded $2.8 million by the Tribunal, but does not suggest that a taking occurred because the amount awarded was less than what it would have received from the court. So we need not enter that thicket. Sperry's point is that if it had not been forced to resort to the Tribunal because its court litigation was suspended and attachments dissolved, the deduction would not have been assessed, and it has to that extent been divested of its property, self-evidently without compensation, as a confiscatory cost recovery effort by the government.

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* In applying the multifactor takings analysis, *Connolly v. Pension Benefit Guaranty Corp.*, 475 U.S. 211, 225 (1986), first looked to the nature of the governmental action and noted that the government did "not physically invade or *permanently appropriate* any of the employer's assests for its own use." (Emphasis added.) If the Court had determined the government had permanently appropriated the *funds* in question, it would have been unnecessary to consider other factors.

The point is well taken. Sperry had a sufficient forum and remedy in the district court, the remedy secured by the prejudgment attachment, and it would have suffered no deduction from a judgment entered by the district court. The Tribunal fully paid Sperry's claim against Iran, but Congress has diminished the award by ordering the percentage withheld before the award was paid over to Sperry. The Tribunal award was the substitute for a judgment by a United States court, *cf. id.* at 687, and the deduction from it was a taking which transgressed the fifth amendment. *See Webb's Fabulous Pharmacies,* 449 U.S. at 163. It must be returned to put Sperry "in the same position monetarily as [it] would have occupied if [its] property had not been taken" *United States v. Reynolds,* 397 U.S. 14, 16 (1970).

By seizing a percentage of the awards of the Tribunal, the government has charged only successful clamants against Iran for the resolution of the hostage crisis. "The Government must pay just compensation when it furthers the Nation's foreign policy goals by using as 'bargaining chips' claims lawfully held by a relatively few persons and subject to the jurisdiction of our courts." *Dames & Moore,* 453 U.S. at 691 (Powell, J., concurring in part and dissenting in part). This was a national crisis and the takings clause was " 'designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.' " *First English Evangelical Lutheran Church v. County of Los Angeles,* 107 S.Ct. 2378, 2388 (1987) (quoting *Armstrong v. United States,* 364 U.S. 40, 49 (1960)).

The government counters, however, that there is no taking because Sperry benefited from the Tribunal and "fails to recognize that it is well-established that those who

trade and travel abroad rely principally upon the relationships between our Government and others as the foundation for all rights." We have no quarrel with the latter proposition, but we do not see the benefit of the Tribunal to Sperry when prior to the Accords it had secured the attachment of Iranian assets sufficient to cover its eventual award and, had the President not suspended American claims, would have had no need for the Tribunal.

This was not a situation like *Shanghai Power Co. v. United States,* 4 Cl. Ct. 237 (1983), *aff'd mem.*, 765 F.2d 159 (Fed. Cir. 1985), on which the government relies, where an American claimant had no recourse against the People's Republic of China, which had years before expropriated its plant, except through the intervention of the United States. Unlike in *Shanghai,* Sperry did not need to rely on the relationship between our government and Iran to recover until the circumstances were altered by the presidential action. Indeed, in *Dames & Moore* the petitioner, situated similarly to Sperry, had already secured a judgment against Iran in district court, 453 U.S. at 666, which only the Supreme Court's decision upholding the nullification of attachments and the suspension of claims prevented of execution.

The President has broad power to resolve international disputes by settling claims, and in certain circumstances some claimants may have to bear a disproportionate burden when settlements result in less than their entitlement. *See id.* at 679. But when the President has divested them of full judicial remedies in federal courts as here, the government cannot diminish the substitute compensation of the alternative forum by arbitrarily keeping a portion for itself.

We are also unpersuaded by the government's related contention that Sperry should have expected the deduction because the United States has routinely deducted a per-

centage from funds distributed by the Foreign Claims Settlement Commission to United States nationals in settlement of claims against foreign countries. *See* 22 U.S.C. § 1626(b). The government argues that Sperry's claims are "analogous" to those handled by the Commission. On the contrary, our situation is entirely different because as we have seen Sperry, unlike claimants before the Commission, had effective recourse to the United States courts, of which it was divested. *See* H. R. Rep. 6382, 84th Cong., 1st Sess., *reprinted in* 1955 U.S. Code Cong. & Admin. News 2745, 2747; *see also* Marks & Grabow, *The President's Foreign Economic Powers after Dames & Moore v. Regan: Legislation by Acquiescence,* 68 Cornell L. Rev. 68, 89-90 (1982) (prior to the Accords, the President had never "settled the commercial claims of American citizens enforceable in United States courts"). Claimants who use the Foreign Claims Settlement Commission ordinarily are otherwise disabled from collecting from the foreign state and do indeed receive a benefit from the Commission. That was not true of Sperry and the Tribunal. And even if the deduction could be said to be "expected," the expectation could only arise after Sperry was forced to proceed before the Tribunal. But the point is, expectation or not, no deduction is assessed in the United States district court, whose jurisdiction Sperry had a right to invoke, but it was extracted from the Tribunal award, purportedly the substitute for a court judgment.

The government is uncertain whether the deduction should be viewed as a fee or a tax. The statute never refers to it as a tax but simply captions it a "[d]eduction for expenses of the United States." Pub. L. No. 99-93, § 502, 99 Stat. 437, 438. There is nothing in the hearings to suggest it is a tax; indeed, the deduction is referred to as a "fee" throughout, *e.g., Iran Claims Legislation: Hearings on S. 771 and S. 116 Before the Senate Committee on Foreign*

Relations, 99th Cong., 1st Sess. 1, 2 (1985), and both a State Department official and the department's responses to submitted questions called it a "fee." *Id.* at 15, 112, 113. We are not inclined to disagree. Nor are we inclined to get immersed in a discussion over the alternative argument that the deduction was intended as a user fee, especially in light of the improbability of the argument because the fee falls only on successful claimants, not on all who "use" the Tribunal. *Cf. Massachusetts v. United States,* 435 U.S. 444, 468 (1978). Whatever it was thought to be, it was a taking of Sperry's money to help settle the national crisis, a burden the government must bear on behalf of all of us. To the extent the Iran Claims Settlement Act put that burden on Sperry alone, it is inconsistent with the fifth amendment and cannot stand.

Our conclusion makes it unnecessary to consider Sperry's equal protection, due process, and origination clause arguments.

Conclusion

Accordingly, the judgment of the Claims Court is reversed, and the case is remanded for further proceedings not inconsistent with this opinion.

REVERSED AND REMANDED

APPENDIX D

UNITED STATES CLAIMS COURT

No. 660-82C

SPERRY CORPORATION, ET AL., PLAINTIFF

v.

THE UNITED STATES, DEFENDANT

Aug. 5, 1987

OPINION

SMITH, Chief Judge.

This matter is before the court on Defendant's Suggestion of Mootness. This opinion elaborates upon an oral ruling given by the court at the close of argument on that motion. That ruling was based upon consideration of the parties submissions and oral argument.

Facts

The plaintiffs, Sperry Corporation and Sperry World Trade, Inc. (collectively "Sperry") are challenging the validity of the Iran Claims Act which was signed into law on August 16, 1985. It allowed the United States to deduct one and a half percent from any award of the Iran Claims Tribunal (Tribunal) of less than $5 million. One percent would be deducted from any amount recovered over $5 million. The deduction from the award was made retroactive to June 7, 1982. Thus, Sperry's award of $2.8 million, which was entered in September of 1982, was reduced by one and a half percent.

To understand the Iran Claims Act we must first look at the events leading up to its passage. In the late 1970's growing hostilities between the United States and the Islamic Republic of Iran resulted in a complete breakdown in relations between the two countries following the illegal detention of United States citizens by Iran. During this time, plaintiffs had various contracts with the Iranian government and many quasi-governmental bodies. These contracts dealt with leasing computer systems and performing data processing services. At the time of the hostage crisis, plaintiffs withdrew their personnel from Iran. They subsequently sued Iran and its instrumentalities in the United States District Court to recover a purported $18 million in damages. *Sperry Corp. v. Islamic Republic of Iran, No. 80-1614 (D.D.C.).* They obtained a prejudgment attachment on Iranian property located in the United States worth approximately $7 million.

On January 19, 1981, the United States entered into the Algiers Accords with Iran. The treaty was designed to end the 444 day hostage crisis and to alleviate the international crisis the Iranian revolution had caused. *See Belk v. United States,* 12 Cl.Ct. 732 (1987). In return for the release of American hostages, the United States agreed to suspend all pending litigation against Iran in United States courts, to terminate all attachments on Iranian property located in the United States and to transfer those assets back to Iran, in addition to other provisions not at issue here. The Tribunal was established in the Hague to adjudicate or otherwise dispose of outstanding claims and a security account was set up at the N.V. Settlement Bank in the Netherlands to hold Iranian funds that would be used to pay Tribunal awards. A fiscal reserve account was likewise set up by the United States at the Federal Reserve Bank of New York (FRBNY) to process awards to United States claimants.

United States claimants whose suits in federal courts were suspended by the Accords sued the government to prevent the implementation of the Accords. They charged that the terms of the compromise were beyond the President's statutory and constitutional authority and constituted a taking in violation of the Fifth Amendment. The Supreme Court, however, upheld the Accords in *Dames & Moore v. Regan,* 453 U.S. 654, 101 S.Ct. 2972, 69 L.Ed.2d 918 (1981). Thus, any United States claimant wishing to pursue a claim against Iran was required to proceed through the Tribunal in the Hague.

Plaintiffs filed a claim with the Tribunal, entered into settlement negotiations with representatives of the Iranian government and settled their claims for $2.8 million on July 8, 1982. The settlement agreement was then submitted to the Tribunal and a final judgment on that amount was entered in September of 1982. Funds in the amount of plaintiffs' award were transferred from the N.V. Settlement Bank to the FRBNY on October 29, 1982. Before plaintiffs were paid, however, the FRBNY deducted two percent from the award pursuant to a directive license issued by the Secretary of the Treasury on June 7, 1982. The government's justification for the fee was to cover costs expended by the departments of Treasury, State, and Justice in the Tribunal process. The fee was authorized by the Independent Offices Appropriations Act, 31 U.S.C. § 9701 (1982) (IOAA).

The plaintiffs brought suit in this court alleging that the directive license was improper. The court through former Chief Judge Kozinski found in a ruling from the bench, on May 1, 1985, that the fee schedule was not founded upon proper consideration of the problem but was, rather, a quickly devised attempt to charge a fee for use of the Tribunal. Judge Kozinski also found that the IOAA authorized only appropriation of funds for services pro-

vided by the appropriating agency. Thus, the fee schedule which sought to deduct fees for the use of the departments of Treasury, State and Justice was invalid.

Congress, apparently in response to this ruling, enacted the Iran Claims Act, which eventually became part of the Foreign Relations Authorization Act. *See generally* Act of August 16, 1985. Pub.L. No. 99-93, Title V, 1985 U.S.Code Cong. & Admin. News (99 Stat.) 437-39. It authorized the deduction of one and a half percent from the first $5 million of a Tribunal award and one percent from any amount greater than $5 million. It was made retroactive to June 7, 1982. *Id.* at § 502(d).

Since the court's holding of May 1, 1985 is now moot if the Iran Claims Act is upheld, the plaintiffs contend as follows: that the Act works a taking of private property for public use without just compensation in violation of the Fifth Amendment to the Constitution, that the Act denies them due process of law, that it violates the Origination Clause of the Constitution, and that its retroactivity is unconstitutional. These contentions will each be addressed in turn.

Taking

The plaintiffs argue that to the extent the deduction is not a tax it is a taking under the Fifth Amendment. The takings clause provides that private property shall not be taken for public use without just compensation. The defendant, however, contends that the deduction is not a taking under the Fifth Amendment. This court's decisions in *Belk v. United States,* 12 Cl.Ct. 732 (1987) and in *Shanghai Power Co. v. United States,* 4 Cl.Ct. 237 (1983), *affd.,* 765 F.2d 159 (Fed.Cir.1985), *cert. denied,* 474 U.S. 909, 106 S.Ct. 279, 88 L.Ed.2d 243 (1985) deal with the standards for determining whether a taking has occurred

in the context of the exercise of the President's foreign policy powers. *Belk* concerned events at the core of the crisis involved in this case. The plaintiffs, thirteen American hostages and two of their spouses, alleged that when the United States executed the Accords it extinguished their causes of action against Iran for false imprisonment, assault and battery, etc., and therefore constituted a taking. *Shanghai Power* concerned President Carter's settlement of the plaintiff's $144 million claim against the Peoples Republic of China for about $20 million. In determining that there was not a taking in both cases we have laid out several factors. Of these factors, three are relevant and will each be discussed in determining the taking issue.

The first factor involves the degree to which a property holders rights can be impaired without working a taking. Here the plaintiffs contend that the one and a half percent deduction was a taking. The interest that the plaintiffs have is in the full amount of the award, which in this case is $2.8 million. From this award Congress has deducted one and a half percent to cover the government's expenses relating to the maintenance of the Tribunal. The degree of impairment here is very small. This is so in terms of either absolute dollars or percentages. Plaintiffs got the vast majority of their claim satisfied.

In the normal day-to-day regulatory activities of society much greater burdens are imposed upon the value of property affected by zoning laws or environmental regulations than the one and a half percentage charge here. *See generally Keystone Bituminous Coal Assn. v. DeBenedictis,* __ U.S. __, 107 S.Ct. 1232, 94 L.Ed.2d 472 (1987); *Penn Central Transportation Company v. New York City,* 438 U.S. 104, 98 S.Ct. 2646, 57 L.Ed.2d 631 (1983); *cf. Shanghai Power,* 4 Cl.Ct. at 239 (plaintiff's claim was compromised by the President from $144 million down to $20 million, a deduction in value of eighty-six percent.) As

one of the benefits of civil society all property holders lose some value in their property with virtually every municipal regulation, tax or fee. But as Justice Holmes noted in *Pennsylvania Coal v. Mahon,* "(g)overnment hardly could go on if to some extent values incident to property could not be diminished without paying for every such change in the general law." 260 U.S. 393, 413, 43 S.Ct. 158, 159, 67 L.Ed. 322 (1922). While virtually every piece of real property would be considerably more valuable if no real estate taxes were ever imposed, it can hardly be argued under current case law that such real estate taxes work a taking.

The second relevant prong of the test laid out in the cases concerns the extent to which a property owner is an incidental beneficiary of governmental action. As recognized in *Dames & Moore,* the President could dissolve the attachment that plaintiffs had on Iranian property located in the United States without working a taking. 453 U.S. at 669-74, 101 S.Ct. at 2981-83. *Shanghai Power* also recognized the problems and risks inherent in doing business in a foreign country. 4 Cl.Ct. at 244-45. Generally, if a problem develops between a United States national and a foreign country, the United States national will have to proceed through the United States government to settle its claims. These claims are unlike ordinary causes of action in domestic law. Their ultimate value depends not upon some intrinsic merit or interpretation of fixed law, but upon the many exigencies of world politics and the Nation's security needs. Thus, in the absence of the establishment and maintenance of the Tribunal by the United States there may well have been no award for the plaintiffs at all. When the matter is examined in this light, it can be seen that Sperry significantly benefited from the Tribunal.

The third relevant prong of the test is whether or not the exercise of governmental power was novel or unexpected. Sperry argues that it did not have any expectations that the

United States would deduct a fee from the settlement. In doing so Sperry cites language in the Algiers Accords which suggests that the cost of maintaining the Tribunal was to be borne equally by the United States and Iranian Governments. The court, however, finds that the cited language in the Algiers Accords was meant to delineate which portion of the cost would be borne by each side. It cannot be construed to be a promise, to United States claimants, that the government will bear the cost of maintaining the Tribunal.

Conversely, in support of its position that the deduction was neither novel and nor unexpected, the government cites the Foreign Claims Settlement Commission's (FCSC) five percent deduction from that Tribunal's awards. In the past when a national had a claim against a foreign country, the claim was settled pursuant to 22 U.S.C. §§ 1621-44m (1982). Under this system the United States collected a lump sum from the foreign country and then distributed it to its nationals with meritorious claims. Sperry is, however, not proceeding under the FCSC because the Iran Claims Tribunal was set up separately as a part of the hostage release settlement. In all other respects, though, Sperry's claims are analogous to claims made under FCSC. Since the FCSC includes a comparable deduction for services, it is not unreasonable to hold that Sperry should have expected the deductions at issue here. This is especially true in light of the fact that the United States has rarely, if ever, paid the cost of providing a forum for the settlement of its citizens claims against a foreign country. Thus, deductions from a settlement, arranged by the United States, with a foreign country are not novel ideas, nor are they unexpected.

Sperry further claims that if the deduction is upheld, it, along with other United States nationals with claims against Iran, will have borne the cost of freeing the hos-

tages. This is not true. Sperry assumed the risk of doing business in Iran and should not complain that it did not work out as planned. Sperry is, in effect, asking the taxpayers of the United States to bear a portion of Sperry's risk of doing business in a foreign country. The deduction is part of the cost of recovering its just claim. While this may work a theoretical anomaly, a violation of the theory of justice, it is a fact of the real world that justice is not a free good. No tort victim is ever made absolutely whole. No remedy ever exactly restores the injured.

In sum the plaintiffs' allegation that the deduction effectuated a taking does not hold up. The deduction is expressly established to cover the cost of maintaining the very forum that assures United State's nationals, like Sperry, recovery on meritorious claims.

Due Process

The plaintiffs also attack the legislation on the grounds that it violates the equal protection of the laws and thus, is a denial of due process in violation of the Fifth Amendment[1]. The contention is that the deduction treats successful applicants differently than unsuccessful applicants. Unsuccessful applicants use the forum and consume valuable resources just as successful applicants do. However, successful applicants bear the cost of maintaining the Tribunal through the deduction, and unsuccessful applicants do not pay for the chance to litigate their claims.

To support their claim plaintiffs rely on the case of *Rinaldi v. Yeager*, 384 U.S. 305, 86 S.Ct. 1497, 16 L.Ed.2d 577 (1966). In that case a prison inmate successfully challenged a state statute which required incarcerated

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[1] *Bolling v. Sharpe*, 347 U.S. 497, 74 S.Ct. 693, 98 L.Ed. 884 (1954) found an equal protection component within the Fifth Amendment Due Process Clause.

felons to pay for the transcript on appeal, but, did not require a felon who was convicted but not incarcerated to pay for the transcript. Plaintiffs contend that the case stands for the proposition that a scheme of reimbursement which does not evenly charge such costs violates equal protection. *Id.* at 309, 86 S.Ct. at 1499. *Rinaldi* itself, though, can be used to uphold defendant's contention that the deduction does not contravene the equal protection of the laws. *Rinaldi* states that equal protection:

> imposes a requirement of some rationality in the nature of the class singled out. To be sure the constitutional demand is not a demand that a statute necessarily apply equally to all persons. 'The constitution does not require things which are different in fact. . . . to be treated in law as though they were the same.' *Tigner v. Texas,* 310 U.S. 141, 147 [60 S.Ct. 879, 882, 84 L.Ed. 1124 (1940)].

384 U.S. at 308-09, 86 S.Ct. at 1499.

The factor distinguishing *Rinaldi* from the present case is that here all successful applicants with an award must pay the deduction. Unsuccessful applicants pay nothing. This in effect creates two different classes. The successful class and the unsuccessful class. All those within each class are treated equally. In *Rinaldi* the class constituted unsuccessful appellants who were irrationally broken down into those who were incarcerated and those who were not. Those who were incarcerated paid and those who were not incarcerated (but nevertheless found guilty) did not pay. This scheme was invidious as well as unsupported by any rational purpose.

In the present case, Congress, along with the State Department reasoned that to charge all users a more than nominal fee would discourage use of the Tribunal to settle Americans claims against Iran. *Iran Claims Legislation:*

Hearings on S.771 and S.1136 Before the Senate Committee on Foreign Relations, 99th Cong., 1st Sess. 114 (1985) (State Department responses to additional questions submitted for the record). This suggests a rational basis for charging successful claimants and not charging unsuccessful claimants.

Origination Clause

The plaintiffs third major argument begins with the Origination Clause of the Constitution. According to plaintiffs' position, the Senate may amend or otherwise attach revenue raising amendments to a House bill which raises revenue, but, may not attach a revenue raising bill to a nonrevenue raising House bill. This is a correct statement of the law as the court understands it. However, the plaintiffs make a fundamental mistake in the application of the Origination Clause to the facts of this case. The preliminary question to be answered is whether the Senate bill is the type of revenue raising bill which must originate in the House of Representatives.

The Origination Clause provides that: "All bills for raising revenue shall originate in the House of Representatives; but the Senate may propose and concur with amendments as on other bills." U.S. Const. art. 1, § 7, Cl. 1. The analysis of an Origination Clause problem is straightforward. The first question is whether the bill in question is revenue raising. In *Twin City Bank v. Nebeker,* 167 U.S. 196, 17 S.Ct. 766, 42 L.Ed. 134 (1897) the Supreme Court declined to define the phrase "bills for raising revenue" stating:

> What bills belong to that class is a question of such magnitude and importance that it is the part of wisdom not to attempt, by any general statement, to cover every possible phase of the subject. It is suffi-

> cient in the present case to say that an act of Congress providing a national currency secured by a pledge of bonds of the United States, and which, in the furtherance of that object, and also to meet the expenses attending the execution of the act, imposed a tax on the notes in circulation . . . , is clearly not a revenue bill which the Constitution declares must originate in the House of Representatives.

Id. at 202, 17 S.Ct. at 769.

The Court went on to quote Mr. Justice Story:

> the practical construction of the Constitution and the history of the origin of the constitutional provision in question proves that revenue bills are those that levy taxes in the strict sense of the word, and are not bills for other purposes which incidentally create revenue. 1 Story on Const. § 880.

Id. at 202-03, 17 S.Ct. at 769.

> Thus, the Court has declared that only those bills which levy taxes in the strict sense of the word are revenue raising. The Supreme Court has defined "tax" as "a charge, a pecuniary burden, for the support of government." *United States v. Baltimore Railroad Co.*, 84 U.S. (17 Wall) 322, 326, 21 L.Ed. 597 (1872). The Supreme Court's statement in *Twin City Bank* that "there was no purpose . . . to raise revenue to be applied in meeting the expenses or obligations of government" is consistent with this construction of the meaning of "tax". *Id.*

The law in question here is known as the Iran Claims Act. The Act was introduced into the Senate on May 17, 1985 by Senators Evans and Lugar to "promote the prompt and efficient processing of claims made by United States citizens and corporations against the government of Iran." 131 Cong.Rec. S6489-90 (Daily Ed. May 17, 1985)

(Statement of Senator Evans.) The Iran Claims Settlement Act became part of the Foreign Relations Appropriations Act, 131 Cong.Rec. H6812 (Daily Ed. July 30, 1985). The purpose of the Foreign Relations Authorizations Act is to authorize appropriations for fiscal years 1986 and 1987 for the Department of State and various other agencies within the foreign relations field. *See generally* Pub.L. No. 99-93, 1985 U.S.Code Cong.Admin.News (99 Stat.) 405.

The Iran Claims Act was designed to provide a forum for United States nationals to litigate their claims against the government of Iran. To reasonably allocate the cost of maintaining the Tribunal, Congress enacted a one and a half percent charge to be applied against the monies awarded successful claimants. There can be no doubt that the act raises revenue. The question is however, does it raise revenue in such a matter that it should have originated in the House rather than the Senate? The answer must be no. The purpose of the act is not to levy taxes in the strict sense of the word (i.e. to support the government) but to expedite the settlement of claims against Iran and to pass the cost of maintaining the Tribunal on to those who ultimately benefit most from it. Thus, any revenue raising is incidental to the purpose of the Act and therefore does not violate the Origination Clause.

Retroactivity

The plaintiffs final attack on the constitutionality of the legislation involves the Due Process Clause of the Fifth Amendment. Plaintiffs state that the legislation as applied retroactively back to June 7, 1982 violates the Due Process Clause of the Fifth Amendment. This contention is fairly easily dealt with. It is well known that the courts will be extremely deferential to Congress where economic legislation is in controversy and will not overturn legislation

unless it does not have any rational basis. *See Pension Benefit Guarantee Corp. v. R.A. Gray Co.*, 467 U.S. 717, 729, 104 S.Ct. 2709, 2717, 81 L.Ed.2d 601 (1984). While this view has come under recent thoughtful criticism, *see generally* Economic Liberties and the Judiciary, 4 Cato Journal 661 (Winter 1985) it is at present the paradigm under which federal courts decide cases. *See generally United States v. Carolene Products Co.*, 304 U.S. 144, 58 S.Ct. 778, 82 L.Ed. 1234 (1938); *West Coast Hotel Co. v. Parrish*, 300 U.S. 379, 57 S.Ct. 578, 81 L.Ed. 703 (1937); *Nebbia v. New York*, 291 U.S. 502, 54 S.Ct. 505, 78 L.Ed. 940 (1934). In *Pension Benefit* the Supreme Court upheld legislation which retroactively created liability for employers who dropped their pension plans. Congress found that without the legislation many companies would have withdrawn from their pension plans. The Court held that this was a rational basis.

This is a considerably easier case. Here Congress has found that it would be unfair to place the burden of maintaining the Tribunal solely on those who were not fortunate enough to have their claims heard early, especially in light of the arbitrary manner in which claims were heard. Congress also found that in the absence of retroactivity those with small claims would bear an undue burden because of the Iranian government's insistence on hearing the larger claims first. *Iran Claims Legislation: Hearings on* S.771 and S.1166 *Before the Senate Committee on Foreign Relations*, 99th Cong. 1st Sess. 120 (1985) (State Department responses to additional questions submitted for the record).

Plaintiffs finally contend that the legislation cannot be applied retroactively since they had no notice. The plaintiff in *Pension Benefit* made the same argument. The Court did not answer the question of whether notice was constitutionally compelled. The Court did, however,

answer plaintiffs' assertion by assuming that notice was compelled and then suggested that plaintiff had notice under ERISA and from the various legislative proposals debated by the Congress. This is analogous to the present case in that Congress had at various times considered legislation authorizing a deduction, *Id.* and the Foreign Claims Settlement Commission had previously used a five percent charge much like the smaller one and a half percent deduction in question here. 22 U.S.C. § 1626(b) (1982).

As long as Congress has some reason for enacting legislation, it will be considered rationally based. *Pension Benefit,* 104 S.Ct. at 2718. Here, Congress had valid reasons to enact the legislation and did not act in a purely arbitrary manner when making it retroactive.

Conclusion

The court concludes that Title V of the Foreign Relations Authorization Act is constitutional. Thus, the prior decision of the Claims Court in the plaintiffs favor is moot. The Clerk is directed to dismiss plaintiffs' claims. Each side is to bear its own costs.

APPENDIX E

UNITED STATES CLAIMS COURT

No. 660-82 C

SPERRY CORP., ET AL, PLAINTIFF

v.

THE UNITED STATES, DEFENDANT

Transcript of Proceedings
Washington, D.C.
May 1, 1985

BENCH RULING

By: Judge ALEX KOZINSKI.

[139] THE COURT: Well, I think we've come to the end of the road.

Thank you, all for very, very fine arguments, and a very find briefing in what is really a very complicated little case.

The most difficult issue, in my view, is the jurisdictional issue: the question of whether or not this case does or does not fall within the treaty exception, 28 U.S.C. Section 1502.

The Court takes little comfort from the fact that there was only one vote in *Shanghai Power* suggesting the treaty exception applied in that case.

The four other judges went to the merits, but that is because the lower court's opinion dealt with the merits. It is probably easier to review than getting into a whole new area.

So, I think the question is a close one. The case, it seems to me, falls squarely within, or rather, between the precedents. It is, on the one hand, not a situation exactly like *Weld* because, in *Weld,* there really was an espousal, a settlement and then an Act of Congress upon which the claimants could rely. They could point to the Act of Congress as their entitlement to the money [140] in question.

In *Great Western* and other cases cited by the defendants, there was really only the treaty, only the international agreement. The claim such as existed prior to that had been espoused by the United States had been extinguished.

So, whatever rights existed belonged to the United States; and, if rights belonged to anybody but the United States, one would have to look at the terms of the treaty and figure that out.

In this case, it is really hybrid, and neither of the lines of precedents really cover it.

On the one hand, we have a claim that grows out of a commercial claim, and it was originally filed in District Court here. There was a prejudgment attachment. It was a claim that one can loosely say, based on the common law—although we know that one cannot sue foreign governments under the common law—but under the Foreign Sovereign Immunities Act, suit was brought and was proceeding along.

Of course, we do not know what the outcome of the lawsuit has been. We do not know what, if any, jurisdictional questions might have existed. But, in any case, we know there was a claim; we know it was brought; we know it was presented to the Court; we know there was a prejudgment attachment.

[141] So, we know that there was a commercial basis to the claim.

Now, what the Algiers Accords did to that claim is really somewhat unusual and very difficult to put into a proper legal pigeonhole. The Algiers Accords, defendant tells us, did not purport to take up the claim, did not purport to espouse the claim, did not purport to appropriate for the United States the claim.

As we all know, the Sovereign can do that. The Sovereign can take the claims of a private party, make them its own by espousing them, and then either pay or not pay, as it is deemed appropriate, the money over to the claimant, if, in fact, it recovers anything.

But the government has been very careful to say that that did not happen here, that the Algiers Accords provided a forum, provided a mechanism for satisfying the claims; and, therefore, the United States really is not the owner of the claims.

Whatever else is clear, I think Mr. Cohen has made it clear that the United States is not an owner of either the claims or the resulting judgments, except, of course, if there is a claim for the 2 percent itself.

The question, then, is the claim to what came out at the other end, which is the tribunal award, is that something that is based on the original common law, so [142] to speak, a claim, or commercial claims that existed before the Algiers Accords; or is it then, or is all of it substantially based upon the tribunal award and tribunal award being something that grows out of the treaty or the international agreement?

I think it is a closed question and, given that, the question is closed. One looks at the policies of the act to see whether or not assumption of jurisdiction in this case were going to follow what Congress had, the evil Congress sought to avoid in passing the exception. And I rely on defendant's assertion what those purposes are as they appear from the legislative history and from the cases.

The one was fear of this kind of claim involves large sums of money. Well, we've calculated it here, even under the most extreme circumstances. Well, they are not talking about very large sums of money; they are talking pretty big money.

But $50 million, $100 million is not the kind of claim that is so significant in light of other jurisdictions this Court has that one would say, "Gee, this is something that Congress would inherently have wanted to preserve for itself."

Even if on talks about the full amount of the possible awards made by the Iranian Claims Tribunal, which [143] up to now have been something on the order of $200-$300 million. It's really not an astounding amount of money. But we're not; we are talking only about 2 percent of that amount and even in the extreme circumstance that a billion or even two billion dollars of claims are paid out, the amount in question will not be that huge that this particular policy would be offended.

The second one policy that defense counselor has raised is that Congress wished to reserve power to act in these areas. But, of course, that is not a situation where Congress has acted, so I'm not quite sure which way that policy cuts, if it has any implication at all.

This situation where the executive has acted pursuant to standing Congressional authority, if indeed there was any authority at all for the fee, is the Independent Office Appropriation Act, which is a statute having nothing to do with either foreign relations or peculiarly with this fact situation.

So, if we have a situation where Congressional exercise of power were in question, this policy would be implicated, but it's not like the situation where the United States espouses a claim, gets a lump-sum settlement, and then Congress has to think about what are we doing [*sic*] to do

with the money—"How should we allocate this?"—as they have done frequently in the past.

[144] Congress hasn't acted and doesn't appear to be interested in acting. We were talking about an exercise of executive authority, so really the powers of Congress are not seriously implicated.

The most important consideration is: Will this interfere with our foreign relations?

This is a clear policy of this statute that the defendant's counsel has suggested, that exercise of the Court's authority in this area might somehow cause deception in our foreign relations, might embarrass the President, or our government or negotiators, or the Department of State.

These are serious types of concerns. They are not to be lightly disregarded, and the Court has in other opinions given significant deference to these concerns—in one case, too much deference; and in another case, the Court of Appeals seems to have thought that too much deference or too much concern was expressed on that score.

But even exercising the same kind of concern in this case, it is very difficult to find the point of the policy implications of a jurisdictional ruling or a ruling on the merits in this case.

There is no need to interpret the treaty or rather the Algiers Accords. The terms of the Algiers Accords have never been in dispute, have never been an issue in [145] the case. The plaintiffs are not seeking to second guess the awards process. They are not seeking to invalidate the tribunal or the awards process. They are not seeking to, in any way, undermine anything that happened on the other side of the ocean.

What they are concerned with is deduction of a fee that happened once the money got to the United States in the hands of federal agencies. The New York Fed might not be an agency for some purposes, but it was an agent of the

United States when it received the money because, as we have learned, it is only a central bank that can receive funds from another central bank.

The deduction occurred on this side of the ocean, and the issue presented is really a relatively narrow one, one that the Court deals with all the time.

Is the fee appropriate under a federal statute, the Independent Office Appropriation Act? And a subsidiary issue: Were any applicable procedural requirements followed, presumably the APA, Administrative Procedure Act?

Those are the kinds of issues that this Court deals with on a regular basis, that other Courts deal with on a regular basis, and that would cause significantly less—in this Court—embarrassment, the possibility of embarrassment, the possibility of entanglement in our foreign relations, and could possibly have happened in [146] the *Langeneger* case, which, once again, the Court of Appeals felt again there was too much deference off of their process.

This is a much weaker case for an argument of actual entanglement in the Court in foreign relations. The questions are statutory, procedural, run-of-the-mill, everyday questions of statutory and regulatory law.

Although the question is not free from doubt, the Court assumes jurisdiction and goes on to the merits of the claim.

A number of arguments have been raised, and the issues, I think, have been presented fairly squarely. If the United States is entitled to promulgate or entitled to, was entitled to and properly did promulgate the fee under the Independent Office Appropriation Act, then it is entitled to keep the money and the plaintiff loses.

If the United States maintained the fee without statutory authority authorization, either because it did not follow the statute or did not follow the procedural require-

ments or, in some other way, the processes are otherwise defective, the plaintiff wins and gets to take its money, unless an argument of laches or some sort of equitable doctrine like that were to prevail. I don't see any disagreement; those are the issues.

And, so, we have to turn to the Independent Office Appropriation Act, and one examines the Act, and one examines [147] the precedents and examines what happened in this case, and a number of problems present themselves.

The first one is that it is quite clear that the IOAA calls for promulgations of fee schedules by regulation, and "by regulation" has been understood and interpreted to mean "by regulations promulgated in accordance with the Administrative Procedure Act."

I do not think there was any doubt on that point, and I am not quite sure whether this was conceded in this case. It certainly was conceded in *Bunge,* and I do not think there is any doubt on that point.

The question was whether or not the fee schedule here in question was promulgated by APA and, of course, there were no notice and comment procedures followed. The record discloses that Treasury officials really did not think this was a regulation at all. This was something to kind of publish, as a courtesy.

Some concern is expressed that claimants would resist this, and so why put something out for comment when you know you are going to get bad comments back and people are going to object. Of course, that is the purpose of the notice and comment procedures of the Administrative Procedure Act, and whether one thinks that is good law or bad law, it does not matter; it is the law.

And fear that one would get bad comments is not [148] a good reason not to follow the law.

Now, it is absolutely clear on this record that, at least on the record as presented, that no thought was given at the

time to the foreign relations exception which has now been raised by the government.

How do we know that? Well, we have a memorandum, the June 4 memorandum, which is Exhibit Number 16 of plaintiff's appendix, and it says:

"This is not a regulation. We don't have to publish it."

So, what does it say? Well, we decided it was not a regulation, and we did not have to publish it for that reason, but, at the same time, there was talk about the foreign policy implcations and here is really the reason why we did not do it.

Nevertheless, we have an explanation from somebody who was apparently in a position to know, and reasons have been given by Mr. Michael as to why the APA exception was, in fact, applicable and why it was not appropriate to have published it and the foreign policy implications such a publication would have had.

The Court accepts that. I think that although there is a great deal of skepticism that can be expressed about what actually happened on the record, this is a particular exception that ought to be more generously applied [149] by the Courts, and that if, in fact, the Court is persuaded, even looking back with some hindsight, that the concerns expressed are reasonable, that they are the kinds of concerns that could properly have been invoked, but not publications of any sort. The Court is inclined to accept them and expresses skepticism as to whether that was, in fact, what happened but nevertheless continuing on down this path of allowing great leeway to the Executive Branch when it gets embarrassed with foreign relations, the Court is willing to say, it is close during skepticism, but it is probably just good enough.

So, we will go on from there. The Court rules that the failure to comply with the APA notice and comment procedures was appropriate because, in effect, an exception

was, in fact, available; but it is aware of other cases that have stated you have to give your reasons right in the publication; you have to give them contemporaneously and whatnot.

The Court will not be that strict. We will accept the comments as given. They seem reasonable, and if that were the only problem, then a fee schedule ought to be approved.

Unfortunately, there are much more serious substantive problems with the fee schedule, and it is difficult to put one's finger on what the worst problem [150] is, and not casting aspersions on anybody, there seems to have been less than the appropriate amount of consideration given to the IOAA, its legal requirements, and the responsibilities of the government in promulgating or in issuing this type of fee schedule.

The Court is aware of the fact that there might have been time pressures, but we are not talking about war; we are not talking about national disaster; we are talking about the question of whether the United States could have held on if it chose to do that, to people's awards for six weeks, three months, six months, at the most, while it saw through the process and came up with a lawful course of action.

There might have been some problems with that. It may be that some claimants would have not liked that, the early claimants, but nothing has been raised that really suggests that this was a real national emergency, that one had to act or else lives would be lost or property would be damaged or whatnot.

This is a convenience. They wanted their money. Nobody though about it, and such lawyering as appears on the record is thin, very thin; and the result is that the fee that has come up with does not even meet the basic requirements of the statute.

For one thing, the statute talks about fees being [151] charged by an agency on an agency-by-agency basis. I think one can twist the language and turn the language to get something else out of it, but I think that a plain English reading of simple words can lead only to the conclusion that the agency may promulgate a fee for services that it provides.

Here is the language:

"It is the sense of Congress that each service or thing of value provided by an agency"—skipping the parenthetical—" to a person, to an agency purported to be self-sustaining to the extent possible."

And then it says:

"The head of each agency may proscribe regulations establishing the charge for service or thing of value provided by the agency."

Now, we can get into questions of what it means to provide a service by an agency, and the Court is inclined to say that if an agency pays for something out of its own budget, it is a service or thing of value provided by the agency.

For example, if Treasury paid out of its appropriation for the NV Settlement Fund or for the operation of the tribunal, or whatnot—and, again, I assume that the information given is correct; there has been no challenge to it. I assume that much of those things are paid out [152] of the Treasury account. Then, there are things of value that arguably are provided by the agency. It does not have to be agency employees who are providing it. If the agency pays for it, and it come out of the agency's appropriations, fine. That's a benefit provided by the agency.

But an agency cannot charge fees for some benefit or service or thing of value provided by another agency, and no amount of twisting of the language of the statute will reach that result.

So, insofar as the fee schedule purported to charge the plaintiffs or anybody else for fees that were not expended for services that were not paid for by Treasury appropriation, either by payment of the salaries of Treasury employees, by payment directly out of Treasury funds, or by payment of fees of the tribunal or whatnot, the fee is invalid because it has concluded in its calculation amounts which are not properly chargeable in a fee schedule issued by the Secretary of the Treasury.

It is highly possible that the Secretary of State could issue a separate fee schedule. The Attorney General, if he feels that the Department of Justice is providing services, it is conceivable that he could provide a separate fee schedule as well.

And there is one thing that is clear is that [153] head of each agency may proscribe fee schedules for benefits provided by their agency; and the fee insofar as in promulgating a fee, the Secretary of the Treasury took into account services provided by other federal agencies, such as the Department of State and the Department of Justice, it is defective. It is a charge for things that they could not properly charge.

Now, we have in the appendix of Exhibit Number 15 a June third memorandum which seems to indicate that among the services charged for are Department of State activity and Department of Justice activity.

But we have something better than that. We have a brief from the defendant in this case detailing all the great things that the government did, and continues to do for these claimants and listed in—this is the original brief—all the statements about how State Department officials are doing all these fine and wonderful things and the Department of Justice officials are doing these things.

It is quite clear that the Department of the Treasury did take these types of service into account, services provided

by other federal agencies and to that extent the fee schedule is invalid.

Moving on to the even more serious problems of the fee schedule, it has to do with the manner in which [154] a fee schedule must be promulgated—and, again, putting to one side the notice and comment requirements of APA, which have been dealt with before:

But what kind of process must an agency go through in promulgating a fee schedule?

What is the kind of thought it must give? What is the kind of documentation it must provide?

What is the system of fact-finding and allocation and calculation that an agency must engage in, in adopting a proper fee schedule under the IOAA?

Now, it is a little bit of an odd question because we have never really seen a case like this before.

In the *Bunge* case, which we saw, we have what looked like a continued—which, again, was not an IOAA case but was close.

What we had was a continuing attempt to make the fees fit the services. Well, it was not a very good job; it was kind of sloppy. It got kind of a slow start, and they were not very good at it.

But they were trying. They had their eye on the ball, and they tried to do the best they could. We had all those D.C. Circuit cases which the Court has expressed some skepticism over, and they were reversed, or perhaps this Court would have issued a different result.

But what is significant about the case is that [155] the agency had actually spent a considerable amount of time trying to make an allocation. It turned out not to be good enough for the D.C. Circuit, but it was something.

What we have here is nothing—absolutely nothing. And defendant who is in the best position to come forward with

something, if there were, has come up with nothing. What we have is a memorandum dated June 3, 1982, detailing the assumptions that were made on how to charge the fee, or, rather, an assumption as to what the costs would be included.

From that we know, of course, that certain services were charged for which could not properly be charged for. But there is nothing to support this memorandum, nothing to suggest why the estimates, the basis for the estimate—it says, for example: "Total awards in excess of $4 billion."

One is baffled, looking at that figure, to know why Leonard E. Santos thought $4 billion rather than $3.5 billion, or $7 billion, or $2 billion, or $1 billion was the appropriate figure.

If one stops to think about it, the escrow account itself was a billion dollars. Presumably, the United States would have negotiated these accords, or thought about what an appropriate escrow account would be, in light of the likely claims.

How one gets to $4 billion? One does not know. [156] Ten-year life for the the tribunal security account? No indication whatsoever what that estimate was based on. Was it a guess? Was it a model? Was it a figure picked out of the air? Was it as far forward as this particular government official could predict?

It just baffles one as to what lies behind these assumptions.

"Annual cost of approximately $8 million." I assume there was some basis for these figures, but it is difficult to tell.

For example, there is an allocation for $.7 million—$700,000, $.7 million—for "miscellaneous direct and indirect costs—Treasury, Justice, and State."

But, ultimately, there was something behind this memorandum that these are not the musings of one official. It

may be the calculations; it maybe got published; it may be there are facts; it may be that there is talk of documentation, but all we're told is we are in a big hurry, and we really did not have time to think about it. It does not lead one to believe that, in fact, there is much substance behind this. If there had been, the Court is confident that the defendant would have come up with it, either by way of documentation or by way of affidavits.

If there was a meeting and nothing was committed to paper, if there were various documents that had to be [157] pulled together, if it was done in some fashion other than normal government memorandum process, surely finding this kind of data involved more than a single individual. It must have involved—or should have involved, or ought to have involved—dozens of people pulling information, estimates, and the like from all quarters of the government.

I cannot believe that we do not have a stack of affidavits a foot high detailing the thought process that went into making these assumptions. They may be valid, but all the court can tell is that it is just a guess.

Now, the reason this all matters is because the Court has to review these things to see whether the agency, in fact, thought about the right things.

The Court is being asked by the government to say: "Well, they did the best they could. They were under pressure, and, golly gee, you know, it was a tough time, and they did the best they could."

And under those circumstances, the Court ought to defer.

The Court is all for deferring. The Court deferred in *Bunge*, in what was a terribly sloppy business, but there was an effort; it was a process; there were people out there thinking about it, and they were doing their best.

When the Court is convinced that people are doing their best, it is likely to step back and say: "Who knows? [158] Maybe they were under pressure; maybe they were involved in, maybe these are very difficult things to document or verify, or whatnot, but here was an attempt. Here is what they did to meet the statutory standards and come up with a conclusion and the Court will defer."

There is nothing to defer to in this case. There is nothing to defer to. And this is just talking about the easy part of the equation, and that is the cost side of the equation. There should not have been any difficulty at all in finding some reasonably substantial documentation for all of this.

Now, the other part of the equation—that is when one gets into probably the most serious difficulties of this fee schedule, is the allocation of the fees to the class of claimants, or the class of those who have made claims before the tribunal.

And here there is not an exaggeration but a plain statement of fact, to say there is zero, nothing in the record to suggest any thought as to what the benefits were that were being conferred upon the people who are going to be charged the fee, and no thought at all in relating those benefits to the costs incurred by the government, and somehow coming up with a fee that reasonably attempted to match benefits and costs.

It is all the Court can tell from every indication [159] that the record discloses, Treasury officials looked at the pattern of the past and said:

"Well, Congress used to charge 5 percent on fees. We will charge—we will use the same kind of formula, but we will use 2 percent of an award in the past in foreign, let's say, claims awards."

The award is paid out, and the Congress authorized the 5 percent fee.

Of course, the 5 percent fee authorized by Congress is a tax. That is what it all is. Congress has decided that it is really not a fee at all. What it is is a tax. Congress said: "We will deduct 5 percent from your award."

Congress can do that. As Justice Douglas recognized in *NCTA*, Congress can decide to subsidize some and to charge more to others. It can decide to relay costs to benefits, or can decide to ignore them.

An agency of the Executive Branch simply does not have that authority. And, insofar as the model that was being followed was the Congressional model of imposing a 5 percent fee, a flat fee, it was a cross model. It is a model that had no applicability to the situation.

They were following a practice of a body that had authorities that an agency of the Executive Branch does not have.

The difficulties with a fee system are manifold, [160] and the Court will only mention a few of them. For one thing, all the fees are allocated, or all of the costs, all of the benefits are allocated to only a portion of the claims.

Now, the Court is not saying that government could not subsidize some claimants and decide not to subsidize others.

But what an agency cannot do under the IOAA is to take all the expenses of a project and then charge only part of the recipients of the benefit.

Congress could, if it wished to, separate out a class of beneficiaries, separate out the costs attributable to providing them the benefit, and then allocate costs among the remaining beneficiaries and say, "Well, the government is going to pick up the tab for the rest of it."

And looking back at the June 3, 1982, memorandum, it is quite clear that in determining what the costs were and what the benefits were. All of the costs of running the

tribunal were allocated to determining the fee schedule, the 2 percent fee.

There is, of course, a very large class of claimants who gets no benefits—who gets a substantial benefit but pays nothing at all and calls themselves "losers." Losers, just like winners, profit from the existence of [161] a tribunal. It may very well be that there are losers who go through weeks of trial, taking up the time of the tribunal, the rent of the building, presumably imposing various costs upon our own government's lawyers who have got to monitor the process, extend the life of the tribunal so that the United States has to incur continuing expenses in running it, and accomplish nothing or very little.

They are charged nothing, or very little by way of fees, whereas claimants who settle or who get an award through litigation get charged on a percentage basis, covering presumably the entire cost of running a tribunal.

The other difficulty, one of the difficulties, apparently, is a class of benefits that is provided by the United States that did not accrue to this plaintiff at all and may not accrue to many of the claimants of the tribunal.

Another service is provided by State Department attorneys who actually represent, the Court understands, interests of small claimants before the tribunal.

Now, here is another situation of a shared benefit where all the costs are allocated to one party. Here is a case of no benefit being conferred on one group of people and yet being charged for providing them benefits—no justification whatsoever under the IOAA for charging claimants who have their own attorneys and are represented by their [162] own attorneys at the tribunals for providing lawyer services for other claimants.

I heard the defense counsel's suggestion to the contrary, and I do not think there is anything there, simply insofar

as the Department of the Treasury is purporting to charge the plaintiff here for services provided by State Department employees in representing other claimants, it is exercising a legislative function, taking from the poor, giving to the rich.

It may be O.K. for Congress to do it; it is not O.K. for the Department of the Treasury under the Independent Office Appropriation Act.

Finally, it is difficult to list these problems in order of their severity.

The percentage fee itself is a suspect mechanism because regardless of allocations which we have talked about, whether the amounts loaded into the costs are appropriate amounts to be loaded in, assuming those are correct, assuming that everybody gets charges across-the-board, losers and winners, a fee that varies with the amount of the award does not on an *a priori* basis have a rational relationship to the benefits that are likely to have been derived by the claimant.

Now, the Court is not saying that a case could not be made for that kind of relationship, that a case [163] could not be made on the facts for establishing such a relationship. It could be shown, for example, that a billion dollar claim, or a $50 million claim imposes proportionately greater costs upon the tribunal process than does a million claim or a $50,000 claim. It is possible, just not beyond the realm of possibility.

No factual showing like that has been made in this case, and it is moreover the kind of relationship that is counter-intuitive, and does not immediately jump to mind.

Litigating a million-dollar claim does not, in the Court's experience, necessarily entail more or proportionately more, or, let's say, ten times more, costs than litigating a $100,000 claim. There might be a relationship there, but

again, there might not. There are many claims involving large sums of money that get resolved on summary judgment or that get settled, or that involve little or no burdens on the process; and then there are those $50,000 claims that live with us forever.

And, again, the Court does not mean to suggest that under a proper set of circumstances a relationship of that Court could not be shown, or some relationship could not be shown where a graduated fee, where some claimants get charged more than others, could not be justified. But it has to be justified; and the fee, as it is here instituted, [164] particularly with respect to this plaintiff, seems to bear no relationship at all to actual costs that have been imposed upon the process, on the one hand, or the benefit derived from the process, on the other.

And nothing has been presented by the defendant to suggest that such a relationship exists or such a relationship could be established.

Now, once again, one has to step back and try to determine what the Court's function is and what is the appropriate allocation of functions between the Court and the agencies of the Executive Branch.

The Court in this case is operating really in a vacuum. Much of what has been advanced to support the fee in this case are conjectures, to some extent, after the fact, suppositions of what could have done and what might have been done.

There has also been a suggestion that, "Oh, this is the best that could have been done. I mean, we really did the best we could under the circumstances."

But this is patently not the case. Agencies can do better, and agencies have done better.

There was not so much, as the record discloses, as a detailed examination of what the precedents in the IOAA area call for, even the discredited D.C. Circuit, which,

after all, is a place where such regulations can [165] be challenged.

Nothing suggests that Treasury officials thought about the process, considered the responsibilities under the process, considered the limitations, considered the severe constitutional question: the question of whether or not an agency of the Executive Branch can act as if it were a committee of a House of Congress.

Now, the Court recognizes there are difficulties in the process. The Court recognizes that the process cannot all be perfect, that reasonable relationships are subject to reason.

What is the reasonable relationship between one thing and another is something that reasonable people can differ over.

But the Court has to have some sense that the process was, in fact, engaged in, that the agency recognizes responsibility under the Act and did its best under the circumstances.

The Court is not persuaded that that is the case. In this record, it simply appears that everybody was in a rush to get on with the process, that there was some pressure from claimants to release the settlements quickly.

A memorandum was written citing two Supreme Court opinions, without citation, without analysis, and simply stating: "Of course, we have lots of power to do this," [166] pointing to what is a false light of the Congressional practice of allocating a fee on the basis of the award made, and then everybody got on merrily with saying this is not a regulation at all, we don't need to publish it; and then going ahead and deducting the fee.

The Court cannot criticize the way in which—will not criticize the way in which Executive Branch officials perform their business. They have lots of things to do; this is obviously a matter of some concern, and that was some that needed to be handled quickly.

All the Court can say, or can look at, is whether or not the Executive Branch or the agency in question has, in fact, done its job—has, in fact done that which the Court can defer to, and say: "The Court will not step into this area because those charged by law with implementing the statute have done their job."

This is not such a case, and it just seems absolutely clear that the nuances, the difficult issues of the Independent Office Appropriation Act were not considered, did not attract anybody's attention. It is the kind of fact-finding and sensitive weighing and balancing to stay within the Supreme Court's directives, to say nothing about the D.C. Circuit directives—just simply did not take place.

For that reason, the fee is invalid; and that [167] is the end of the matter.

Now, the defendant has suggested that there might have been laches involved, somewhat like in the *Bunge* case. It is kind of a belated claim, but it was raised belatedly in *Bunge* too.

Bunge was a different case, however. In *Bunge*, there were actual benefits that had gone back to the claimants themselves, or rather the class of people for whom the claimants were a part, which meant that the fund that claimants said was improperly collected had been depleted, and had been depleted to benefit the very class of the plaintiffs in that case.

Moreover, the plaintiffs in that case were in this business and were engaged in paying these fees and dealing with FGIS—Federal Grants Inspection Service—on this issue on a continuing basis from the date the regulations were promulgated, or rather were not promulgated on the day that the fee schedules went into effect, even before that.

In this case, as far as this particular plaintiff is concerned, they, of course, were in the process; they were in

the claims process, but no doubt they were busy in Iran not knowing whether or not they were going to get anything for their money, and they were busy negotiating that.

[168] The earliest date really the Court can charge these plaintiffs with having responsibility to do something would have been September 14, the date of the award. Before that, they did not know whether, in fact, they would get an award, the size of the award, what interest they would have.

Now, if this would have been six years later, it would have been different. We are really only talking about the difference between June and September – four months, six months, or something of that sort. I am not sure that, in any case, this would be a long enough period for a claim of laches to have matured.

But, in any case, no later than October 1, these claimants or these plaintiffs brought their claims to the attention of Treasury officials, and, frankly, until this day it has been carefully ignored. It is not as if the government said: "Gee, you know, as soon as we found out our mistake, potential mistake, a possible problem, we went out, and we did it right. Look at them, they did not let us know earlier on their part."

The case has been – it is now almost three years, certainly more than two-and-a-half years that Treasury officials should have known of their error and any objective analysis of the law should have allowed them to predict the Court' substantive result.

[169] Of course, defendant does have a pretty good jurisdictional argument, and that alone, of course, would be a reason not to give up on this particular case.

But one just talks about trying to do the right thing, or the claim being – "Well, we didn't know we had a problem

until it was brought to our attention"—surely, when the claim was brought to defendant's attention, even though they were inclined to fix the problem, they had every opportunity between October 1, 1982, and this date to do so.

Counsel for the government represents that this has not been done. It is a little difficult to really give much credence to the claim of laches, both because of the shortness of the time period, the time in which claimant's claim arose and defendant's failure to really move very quickly once they did find out there was a problem.

So, the Court rules that it had jurisdiction, that Independent Office Appropriation Act applies, that the Treasury to directive license failed to comply with the Independent Office Appropriation Act, and for that reason the fee is not valid.

The defendant has suggested that if there is the result the Court finally comes to, that the appropriate methodology is to order a remand rather than a judgment for the plaintiff. The Court is not going to take that [170] approach.

The question in this Court, unlike the district courts—the question in this Court is not the propriety of the agency's procedure in and of itself. The question is: Did the government grant the money under appropriate authority?

And, if the Court is convinced that the government did not take the money under lawful authority, it cannot very well allow the Government to keep it, even for a minute.

So, having found that there was no authority to keep the 2 percent, the Court is constrained to enter a judgment ordering or rather calling for the repayment.

I want to be careful to—that everybody understand my ruling.

There is nothing about what the Court has said today that speaks to what the effect, if any, would be of a

properly promulgated fee, if a fee is properly promulgated and issued, vis-a-vis futher [*sic*] or past claimants before the tribunal.

That issued was not raised, and the Court expresses no view as to whether the defendant can go back, come up with a proper fee schedule, impose it from that point forward, or you can go backways and impose it upon this claimant or other claimants.

That question is not being adjudicated today, [171] and has not been briefed, and frankly, I have no idea what the answer to that question is. I certainly do not express the view that something ought to be done, or ought not to be done.

I am simply making clear that the Court's ruling today is that retaining the fee pursuant to directive licensing at the time when it was retained was unlawful because the directive license was unlawful, and the money now has to be returned.

Future cases will take care of themselves, of course.

That's it.

Anything else I can do or say?

Want to settle?

MR. SEIVER: I don't think there is anything else I have. The motion for class certification, I believe, is still pending. We did not argue or address that today.

THE COURT: Yes. Well, I am inclined to deny that motion. I think that this probably takes care of the case.

I am inclined to write an opinion in this case, but I could be talked out of it. I have also got a bunch of other things that come ahead, and I know the plaintiff wants his money badly.

So, do you have a view on the question of my [172] opinion?

MR. SEIVER: Your Honor, we would prefer an opinion. I would understand, though, the judgment which was

rendered today from the Bench would be properly appealable as a final Order of the Court, and the reasoning which the Court has given would be sufficient.

So as not to delay any expected appeal by the government, we would think that the Court could certify it now, that this is the judgment and that the opinion would follow and perhaps the Federal Circuit would not want to take an appeal at this time.

We would prefer an opinion, though, whether or not it holds up the appeal process or not.

THE COURT: O.K.

Mr. Cohen, what's your view?

MR. COHEN: Well, I'd like to consult with my client, Your Honor.

THE COURT: Maybe we could all come back in a week or two; you tell me you have all settled and the case has gone away.

Order a transcript, and read it to your client.

MR. COHEN: Yes, I think it's—

THE COURT: I mean you are going to spend another year on appeals, and whatnot, and probably wind up in the same place and be more money behind.

[173] How about this? Why don't you all come back in a week or two, and maybe there is some way of resolving this case. You have my ruling. I will stick by it.

I am inclined to write an opinion, but I would like to hear what you say, Mr. Cohen. If I write an opinion, I am not inclined to send the judgment out and then follow it up. I will hold on to the case until I write it.

What do you thing [*sic*]?

MR. SEIVER: I think that would be fine, Your Honor, and, as long as—maybe I should direct this to the Court Reporter, about obtaining a transcript as quickly as possible.

THE COURT: Anybody can buy a transcript. Just take it up with the Reporter.

MR. SEIVER: O.K.

THE COURT: I mean, any litigant can.

All right, shall we make it two weeks?

MR. COHEN: That would be fine with me, Your Honor.

THE COURT: I have heard it all now. It is not final until the Supreme Court denies the hearing for what it is worth.

MR. SEIVER: May 15, Your Honor?

(Pause)

[174] THE COURT: How about the 14th, at 10 o'clock? It is a Tuesday. I am going to be in here for something else anyway. I would like to hear how you are doing. Just a brief get-together, O.K.?

MR. SEIVER: That is fine.

MR. COHEN: Fine.

THE COURT: Again, a very excellent job on both sides, both arguing and briefing and the like.

It's always a great pleasure for me to see a good advocacy.

MR. SEIVER: Thank you.

MR. COHEN: Thank you.

(Whereupon, at 2:06 p.m., the hearing was adjourned.)